The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective

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I. INTRODUCTION

For some time now I have been following the legitimacy debate—whether in constitutional adjudication it is legitimate for the Supreme Court to engage in what has been called noninterpretive review[1] —as an interested, but somewhat detached, observer. My approach to constitutional law, both as a teacher and as a commentator, has been primarily to analyze the Court's institutional behavior, focusing on the results that the Court reaches in practice and on the relationship between those results and the Court's articulated doctrine.[2] I am not particularly comfortable in dealing with constitutional theory, particularly when it becomes rarefied and enters the realm of philosophy and jurisprudence. Consequently, except for ongoing informal discussions with my colleague, Professor Joseph Grano, I have heretofore stayed out of the debate.

What has intrigued me the most about the debate, however, is its utterly academic nature. The Supreme Court has expressed no apparent interest in the debate, even while it continues to be sharply divided not only over the results in particular cases, but also over how interventionist a stance the Court should take.[3] That ostensible disinterest on the part of the Court, in what Professor Michael Perry calls the "central problem of contemporary constitutional theory,"[4] appears to be quite significant to one like me, for whom the focal point of analysis is the Court's institutional behavior. Why is the Court apparently so disinterested? Why does the Court not share the concern of the academic theorists about the legitimacy of what it is doing, particularly when it is so divided over the extent to which it should invalidate governmental action as being prohibited by the Constitution?

Perhaps the explanation for the Court's seeming indifference to the legitimacy debate is that the Court resolved the legitimacy question long ago, and that as an institution it has had no doubt about the framework within which it should proceed in constitutional adjudication. I have strongly sus-

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1. In the broad sense, noninterpretive review means that in the resolution of constitutional questions the judiciary may go beyond the values purportedly constitutionalized by the framers. *See infra* subpart II(C).

2. The Court's institutional behavior evolves over a period of time, and it is not always consistent with the Court's articulated doctrine. The law of the Constitution is a reflection of the interaction between the Court's articulated doctrine and the results that the Court reaches in applying that doctrine. The behavior of the Court as an institution, of course, is distinct from the behavior of the individual Justices, *i.e.*, how they would decide individual cases. In simple terms, the Court's institutional behavior refers to what the Court does in the process of constitutional adjudication.

3. *See infra* notes 109–27 and accompanying text.

4. M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 6 (1982) [hereinafter cited as PERRY].

pected that this is the reason the Court has treated the academic debate over legitimacy with apparent indifference. At the same time, I have believed that the Court's own view about the legitimacy of what it has been doing and about the nature of its function in constitutional adjudication might provide some insights into the academic debate.

I have been thinking about doing this kind of institutional analysis for some time. The publication of Professor Perry's excellent book,[5] setting forth his justification for noninterpretive review, and the publication of Professor Grano's major work,[6] setting forth his arguments concerning the illegitimacy of noninterpretive review, finally motivated me to act. The coincidence of the publication of these works by my two good friends, setting forth diametrically opposite viewpoints, furnished the appropriate occasion for me to enter the controversy and to see whether I could support my skepticism about the relevance of the academic debate. To gain a basic understanding of the debate, I read most of the major writings in the area. This task caused me some trepidation, but in light of my approach it is probably not of great moment whether I fully appreciate all the nuances and variations in the works of the theorists.[7] I think that I understand the basic controversy and the general differences of viewpoint well enough for my present purposes.

I begin by discussing the legitimacy debate and how it relates to the purported tensions between judicial review and representative democracy. I then discuss the differing positions on the question of legitimacy: the interpretivist and noninterpretivist positions, and some of the variations within each. I conclude that the debate cannot be objectively resolved because both viewpoints proceed on totally different underlying premises. In the next section of the Article I discuss the institutional behavior of the Supreme Court in constitutional adjudication and show why the Court has never doubted that noninterpretive judicial review is an integral part of the Court's performance of its constitutional function. Finally, I try to provide a different perspective on the legitimacy question and to demonstrate that noninterpretive review is not only legitimate, but is also a necessary postulate of constitutional adjudication under our constitutional scheme. Therefore, I conclude not only that the current legitimacy debate is completely academic, but also that it is quite properly treated by the Court as irrelevant in the process of constitutional adjudication.

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5. PERRY, *supra* note 4.

6. Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1 (1981) [hereinafter cited as Grano].

7. The literature is now quite vast. Some works that I have read I do not discuss in this Article. Some works I did not read. But I am satisfied that I have read the major writings in this area and have a fairly good understanding of the nature of the legitimacy debate.

II. The Legitimacy Debate: An Analysis and an Assessment

A. *The Framework of the Debate: The Purported Tension Between Noninterpretive Review and Representative Democracy*

Perry says that the legitimacy of noninterpretive review is the "central and most difficult problem of contemporary constitutional theory."[8] Noninterpretive review, he says, involves the Court in "constitutional policymaking" because the Court goes beyond "value judgments" made by the framers.[9] According to Perry and other theorists, constitutional policy making by the judiciary aggravates the tension purportedly inherent in any judicial review. Whenever the Court engages in judicial review, it invalidates the policy choices of the electorally accountable branches of the federal and state governments,[10] and the tension between judicial review and representative democracy is aggravated when the invalidation is not based on values constitutionalized, or value judgments made, by the framers.

Perry fairly explains the interpretivist position on the illegitimacy of constitutional policy making by the judiciary. Governmental decisions determining which competing values should prevail should be subject to control by persons accountable, directly or indirectly, to the electorate. Constitutional constraints on electorally accountable policy making consist of value judgments constitutionalized by the framers. It is not legitimate for the federal judiciary, which is not electorally accountable, "to engage in constitutional *policymaking* . . . as opposed to constitutional *interpretation*."[11] The only legitimate function of the judiciary regarding policy making is to keep it within constitutional bounds, and the judiciary must do so with "reference to value judgments constitutionalized by the framers."[12]

Grano argues that noninterpretive review is inconsistent with democratic self-government and that the Constitution furnishes no authority for "the judiciary to constitutionalize moral values not fairly inferable from the document itself."[13] He maintains that while "considerable evidence exists that the framers expected the judiciary to declare legislation unconstitutional,"[14] it cannot be demonstrated that the framers intended the judiciary to have the broad authority to invalidate legislation by invoking nonpositivistic moral

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8. PERRY, *supra* note 4, at 6.

9. *Id.* at 11, 20.

10. *Id.* at 9. For a discussion whether the legitimacy of striking down state legislation should be determined apart from the legitimacy of striking down federal legislation, see *id.* at 35–36.

11. *Id.* at 28–29.

12. *Id.* at 29.

13. Grano, *supra* note 6, at 8.

14. *Id.* at 15. In support of this proposition, Grano cites C. BLACK, THE PEOPLE AND THE COURT 22–25 (1960), and A. BICKEL, THE LEAST DANGEROUS BRANCH 15 (1962). For a discussion of whether the framers intended the courts to exercise judicial review, see PERRY, *supra* note 4, at 14–17, and the works cited on those pages.

principles.[15] He notes, in this regard, that in *Marbury v. Madison*[16] the Court engaged only in interpretive review because "the judgment could be rendered with reference to the text, history, and structure of article III."[17]

Judge Robert Bork, another exponent of the interpretivist position, relates interpretive review (the only legitimate mode of review) to the matter of majority and minority freedom. The *Madison* model, says Bork, has both a majoritarian and a countermajoritarian premise. In most areas of life, majorities are entitled to rule for no better reason than that they are majorities, but some areas of life a majority should not control. The dilemma is resolved both in constitutional theory and in popular understanding by the Supreme Court's power to define both majority and minority freedom through the interpretation of the Constitution.[18] It follows, therefore, according to Bork, "that the Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom."[19] Thus, once the Court goes outside the Constitution and engages in what Perry calls constitutional policy making, Bork would say that the Court is acting illegitimately because it is not relying on the Constitution to define the spheres of majority and minority power.

Dean John Hart Ely, in his now classic work on constitutional theory,[20] fully explores the purported tensions between noninterpretive review and representative democracy. According to Ely, "the usual brand of noninterpretivism, with its appeal to some notion to be found neither in the Constitution nor, obviously, in the judgment of the political branches, seems especially vulnerable to a charge of inconsistency with democratic theory."[21] In addition, he says that the "tricky task has been and remains that of devising a way of protecting minorities from majority tyranny that is not a flagrant contradiction of the principle of majority rule . . . ."[22] The point of difference between the interpretive and the noninterpretive positions highlights this problem: "The noninterpretivist would have politically unaccountable judges select and define the values to be placed beyond majority control," while the interpretivist would take those values from only the Constitution itself.[23]

It is fair to say, therefore, that the legitimacy debate has proceeded on the assumption that the legitimacy question arises from an inherent tension between judicial review and representative democracy, which is aggravated when the

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15. Grano, *supra* note 6, at 16–17.
16. 5 U.S. (1 Cranch) 137 (1803).
17. Grano, *supra* note 6, at 11.
18. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2–3 (1971).
19. *Id.* at 3.
20. J. ELY, DEMOCRACY AND DISTRUST (1980).
21. *Id.* at 5.
22. *Id.* at 8.
23. *Id.* By the phrase "values taken from the Constitution itself," the interpretivists refer to values purportedly constitutionalized by the framers. *See infra* notes 33–38 and accompanying text.

Court engages in noninterpretive review. This aggravation results because, in that circumstance, the basis of the Court's invalidation of electorally accountable policy making is not values constitutionalized, and value judgments made, by the framers. The interpretivists maintain that the Court cannot legitimately go beyond those values and value judgments in constitutional adjudication, while the noninterpretivists maintain that either generally, or at least for certain purposes, the Court may infuse values into the Constitution that were not demonstrably constitutionalized by the framers and may invalidate electorally accountable policy making that it finds inconsistent with those judicially infused values.

This Article will demonstrate, in discussing the structure of governance established by the Constitution, that the purported tension between representative democracy and noninterpretive review is illusory. As a result, the underlying assumption of the legitimacy debate is completely erroneous, and the framework within which the debate has proceeded is analytically unsound. Thus, the validity of the debate itself is most dubious.

B. *The Interpretivist Position*

The essence of the interpretivist position is that judicial review is legitimate only if the invalidation of electorally accountable policy making relates to the intention of the framers and to values constitutionalized by the framers. Variations do exist in the interpretivist position, but only in terms of the degree of deference afforded the intention of the framers. At one end of the interpretivist spectrum is the view of Raoul Berger, who maintains that all constitutional questions must be resolved by referring to the specific intentions of the framers and that the only practices the Court can legitimately declare to be unconstitutional are those that the framers specifically intended to ban by adopting a particular constitutional provision and those that are analogues to practices that the framers specifically intended to ban.[24] Berger contends, for example, that the framers of the fourteenth amendment's equal protection clause intended to prohibit racial discrimination only in the exercise of certain rights, of which education was not one.[25] Consequently, the Supreme Court's decision in *Brown v. Board of Education*[26] was not consistent with the intention of the framers and, therefore, was not a legitimate exercise of judicial review.[27] Thus, Berger's view of interpretivism is one of

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24. *See generally* R. BERGER, GOVERNMENT BY JUDICIARY 133, 191–92, 249–50 (1977).

25. *Id.* at 18–36, 133, 169, 176, 191. "[T]he framers employed 'equal protection of the law' to express their limited purpose: to secure the rights enumerated in the Civil Rights Act, and those only, against *discriminatory* State *legislation*." *Id.* at 133 (emphasis in original).

26. 347 U.S. 483 (1954).

27. For an incisive criticism of Berger's interpretation of the preadoption history of the fourteenth amendment, see Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 MICH. L. REV. 462 (1982). Professor Dimond insists that the preadoption history demonstrates that the fourteenth amendment (particularly the equal protection clause) was "framed in general terms and did not have a generally accepted and narrowly limited meaning." *Id.* at 502.

original understanding in a very exact sense, or what Professor Paul Brest calls "strict originalism."[28]

At the other end of the interpretivist spectrum is Professor Grano's view, which looks to the broader intention of the framers and to the values that the framers intended to constitutionalize. Grano maintains that the Constitution should not be read to authorize a methodology of judicial review that would permit the federal judiciary to constitutionalize moral values or principles of justice "not fairly inferable from the document itself."[29] He says that the framers did not intend the judiciary to have the broad authority to invalidate legislation by invoking "nonpositivistic moral principles."[30] Thus, the only values on which the Court can rely to invalidate electorally accountable policy making are those that have been constitutionalized by the framers.[31]

Although Grano refers to the written Constitution's "text or structure,"[32] it is clear that his view of interpretivism looks to the intention of the framers and to the values that they intended to constitutionalize rather than to the text of the Constitution itself.[33] For example, Grano argues that although the text of the fourteenth amendment's equal protection clause says that no state shall "deny to any person . . . the equal protection of the laws,"[34] the framers intended to proscribe only discrimination based on race or national origin[35] and, therefore, to constitutionalize only the value of racial equality.[36] According to Grano, under interpretivist review "the Court gives meaning to frequently nondiscrete, nonspecific value judgments that the framers wrote into the Constitution";[37] under noninterpretivist review, in contrast, "the Court's source of judgment is completely extra-constitutional."[38]

Apart from limiting judicial review to values constitutionalized by the framers, Grano's view of interpretivism does not make the Court's resolution of contemporary constitutional questions depend on the specific intentions or

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28. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 222–23 (1980) [hereinafter cited as Brest].

29. Grano, *supra* note 6, at 8.

30. *Id.* at 16.

31. *Id.* at 64.

32. *Id.*

33. For a discussion of the difference between textualism and intentionalism, see Brest, *supra* note 28, at 205–17, 222–23.

34. U.S. CONST. amend. XIV, § 1.

35. Grano makes this point in the context of broadening the scope of the equal protection clause in the area of racial discrimination beyond the specific intentions of the framers. He says that a strong argument can be made that the framers saw the fourteenth amendment as protecting "blacks from state discrimination that relegated them to an inferior status," so that the *Brown* decision is legitimate "even if . . . the framers assumed the fourteenth amendment would not apply to segregated schools." Grano, *supra* note 6, at 70–71. That interpretation of the equal protection clause is permissible, says Grano, because the framers constitutionalized the value of racial equality. *Id.*

36. Although Grano does not specifically discuss this point, it follows from his analysis that the framers did not intend to constitutionalize any other equality value. He would have to say, therefore, consistent with his analysis of legitimacy, that it is not legitimate for the Court to rely on the equal protection clause to invalidate any form of discrimination other than that on the basis of race or ethnic origin.

37. Grano, *supra* note 6, at 64.

38. *Id.* By this he means that it is based on values that were not constitutionalized by the framers.

the original understanding of the framers. He states: "Interpretivism cannot be narrow in scope because this would defeat the framers' purpose of trying to govern the future through broad, general proscriptions; interpretivism cannot be narrow precisely because constitutional provisions are rarely narrow or specific in definition."[39] As long as the Court stays within the perimeters of the values constitutionalized by the framers, then, it is not limited by the framers' original understanding of the practices that would be invalidated under a particular constitutional provision.[40] Thus, Grano not only maintains that the Court acted legitimately in deciding *Brown* as it did,[41] but he would also permit the Court to define the value of racial equality by referring to contemporary notions of what racial equality should mean. He would not say that the Court acted illegitimately in *Loving v. Virginia*[42] when it looked to the broad, organic purpose of the fourteenth amendment to invalidate a state antimiscegenation law without considering whether the framers of the Amendment intended to prohibit this practice.[43] Also, it was not improper for the Court in *Regents of the University of California v. Bakke*[44] to apply the same level of scrutiny to laws that discriminated against whites in favor of blacks as it did to laws that discriminated against blacks in favor of whites.[45]

Since the framers of the fourteenth amendment's equal protection clause intended to constitutionalize only the value of racial equality, however, Grano would have to say, consistent with his analysis of legitimacy, that the Court cannot properly rely on the equal protection clause to invalidate other classifications based on identifiable group membership, such as alienage, illegitimacy, or gender, or to strike down certain discriminations based on poverty, or to invalidate general classifications on rational basis or fundamental rights grounds.[46] Similarly, since he maintains that the framers constitutionalized

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39. *Id.*

40. He illustrates this point with Katz v. United States, 389 U.S. 347 (1967), in which the Court held that governmental wiretapping constitutes a fourth amendment search, and with Taylor v. Louisiana, 419 U.S. 522 (1975), in which the Court interpreted the sixth amendment to invalidate a state law that had the effect of systematically excluding women from jury service. Even though the framers may not have specifically intended to ban eavesdropping, which is analogous to wiretapping, and even though they may not have contemplated that women would sit on juries, the Court's holdings in those cases, Grano says, were based on values constitutionalized by the framers and not on "values derived from external sources." Grano, *supra* note 6, at 65–75.

41. Grano, *supra* note 6, at 70–73.

42. 388 U.S. 1 (1967).

43. The Court in *Loving* took the position, as it did in *Brown*, that the historical sources were inconclusive. *Id.* at 9. In *Loving*, however, the Court downplayed the significance of historical sources generally, because it looked to the broad, organic purpose of the fourteenth amendment rather than to the specific intent of the framers to proscribe particular practices. Regardless of whether the framers specifically intended to ban antimiscegenation laws, the Court held that such laws were unconstitutional because they were inconsistent with the broad, organic purpose of the fourteenth amendment "to eliminate all official state sources of invidious racial discrimination in the States." *Id.*

44. 438 U.S. 265 (1978).

45. Justice Powell observed in *Bakke*: "It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others." *Id.* at 295 (emphasis in original). For Grano's view on the proper approach to the constitutionality of the racial preference considered in *Bakke*, see Grano, Book Review, 26 WAYNE L. REV. 1395, 1401–11 (1980) (reviewing A. SINDLER, BAKKE, DEFUNIS AND MINORITY ADMISSIONS (1978)).

46. *See supra* note 36.

only "process" values into the due process clause, the Court's imputation of a substantive meaning to due process, from *Lochner v. New York*[47] to *Roe v. Wade*,[48] was necessarily illegitimate.[49] As Grano emphasizes, nothing in his more expansive view of interpretivism "supports the far different viewpoint that the judiciary should be able to constitutionalize values not inferable from the Constitution itself."[50]

Because the variations in the interpretivist position arise only from differences in the degree of deference due the intention of the framers, and because Grano's view is the most expansive in this regard, this Article uses his view as the reference point in its analysis of the interpretivist position. That interpretivist view is described by Professor Brest as "moderate originalism."[51] Brest maintains that while "strict originalism" is not a "tenable approach to constitutional decisionmaking,"[52] "moderate originalism" is "coherent and workable."[53] Brest also says that the only difference between moderate originalism and nonoriginalist adjudication—noninterpretive review—is one of attitude toward the text and original understanding. For the moderate originalist these sources are conclusive, at least when they speak clearly. For the nonoriginalist the text and original understanding are only presumptively binding; neither is a necessary nor a sufficient condition for constitutional decision making.[54] Brest also demonstrates, however, that this different attitude toward the text and original understanding produces markedly different results in constitutional adjudication.[55]

To sum up, the focal point of moderate originalism as developed by Grano—his more expansive view of interpretivism—is the values that the framers intended to constitutionalize. Those values, Grano says, can be determined from the historical circumstances surrounding the adoption of the constitutional provisions.[56] When the Court infuses values into the Constitution that were not constitutionalized by the framers and relies on those values

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47. 198 U.S. 45 (1905).

48. 410 U.S. 113 (1973).

49. Grano states that there is no "objective source [in the Constitution] for defining fundamental rights." Grano, *supra* note 6, at 28.

50. *Id.* at 64. Again, when Grano uses the phrase "values not inferable from the Constitution itself" he is referring to values not constitutionalized by the framers. The text of the fourteenth amendment, for example, can be said to infer the very broad value of equality. *See infra* note 196 and accompanying text.

51. Brest, *supra* note 28, at 205, 223–24. It is moderate originalism of the intentionalist rather than the textualist variety.

52. *Id.* at 205–22, 229–31. *See also* J. ELY, DEMOCRACY AND DISTRUST 11–42 (1980).

53. Brest, *supra* note 28, at 205.

54. *Id.* at 229–37.

55. *Id.* at 223–24.

56. For our present purposes we may assume that it is possible to ascertain from the preadoption history of a particular constitutional provision what values the framers purportedly constitutionalized into that provision. As this Article will demonstrate, however, it is quite doubtful whether the framers actually intended to constitutionalize values when they were drafting constitutional provisions. For a discussion of the difficulty of determining the intentions of the framers generally, see Brest, *supra* note 28, at 214–22. Brest concludes:

> The interpreter's understanding of the original understanding may be so indeterminate as to undermine the rationale for originalism. Although the origins of some constitutional doctrines are almost certainly established, the historical grounding of many others is quite controversial. It seems peculiar, to say the

to invalidate actions of the electorally accountable branches, Grano contends, the Court is acting in an illegitimate manner and is not properly performing the judicial function authorized by article III.

C. *The Noninterpretivist Position*

The essence of the noninterpretivist position is that in constitutional adjudication the Court may legitimately go beyond values constitutionalized by the framers and rely on judicially infused values to invalidate electorally accountable policy making. Brest maintains: "[T]he aims of constitutionalism are best served by nonoriginalist adjudication which treats the text and original history as important but not necessarily authoritative."[57]

While substantially more variations exist in the noninterpretivist position than in the interpretivist,[58] the different views of noninterpretivism can be categorized according to two justifications. One is the functional justification: noninterpretivist review is justifiable because it serves a very important function in our constitutional system and in society as a whole. The other may be termed the consistency justification: noninterpretivist review is consistent with the general intention of the framers in promulgating the Constitution and in adopting its particular provisions.

Professor Perry and Professor Brest are two of the principal proponents of the functional justification. Perry contends:

> There is . . . no way to avoid the conclusion that noninterpretive review, whether of state or federal action, cannot be justified by reference either to the text or the intentions of the framers. . . . The justification for the practice, if there is one, must be functional: If noninterpretive review serves a crucial governmental function that no other practice realistically can be expected to serve, and if it serves that function in a manner that somehow accommodates the principle of electorally accountable policymaking, then that function constitutes the justification for noninterpretive review.[59]

Perry finds this functional justification in the need for the protection of fundamental human rights by an institution that is capable of discovering "the right answers . . . to fundamental political-moral problems."[60] He maintains that "[o]ver time, the practice of noninterpretive review has evolved as a way of remedying what would otherwise be a serious defect in American govern-

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least, that the legitimacy of current doctrine should turn on the historian's judgment that it seems "more likely than not," or even "rather likely," that the adopters intended it some one or two centuries ago.

Id. at 222 (footnote omitted).

57. *Id.* at 228. When Brest refers to the "text" of the Constitution, he is referring to the textualist mode of constitutional analysis. Textualism emphasizes the language of a provision as the framers understood it at the time of promulgation.

58. PERRY, *supra* note 4, at 24. It should not be surprising that a number of commentators have made a very strong effort to justify noninterpretive review, since those commentators agree that many of the Court's important decisions in the area of individual rights can be supported only on that basis.

59. PERRY, *supra* note 4, at 24.

60. *Id.* at 102.

ment—the absence of any policymaking institution that *regularly* deals with fundamental political-moral problems other than by mechanical reference to established moral conventions."[61] He thus concludes:

> My essential claim, then, is that noninterpretive review in human rights cases enables us to take seriously—indeed is a way of taking seriously—the possibility that there are right answers to political-moral problems. As a matter of comparative institutional competence, the politically insulated federal judiciary is more likely, when the human rights issue is a deeply controversial one, to move us in the direction of a right answer (assuming there is such a thing) than is the political process left to its own devices, which tends to resolve such issues by reflective, mechanical reference to established moral conventions.[62]

For the Court to perform this crucial function in American society, Perry contends that it cannot be limited to values constitutionalized by the framers or to the original understanding of the Constitution, but, instead, must make independent value choices and look to "determinative norms [that] . . . derive from the judge's own moral vision."[63]

Professor Brest argues that noninterpretivist review is functionally justified because, more than any other tenable mode of review (such as moderate originalism), it "contribute[s] to the well-being of our society—or, more narrowly, to the ends of constitutional government."[64] He says that to determine whether one mode of review is preferable to another, that mode should "(1) foster democratic government; (2) protect individuals against arbitrary, unfair and intrusive official action; (3) conduce to a political order that is relatively stable but which also responds to changing conditions, values and needs; (4) not readily lend itself to arbitrary decisions or abuses; and (5) be acceptable to the populace."[65] He then attempts to demonstrate that noninterpretivist review serves these ends better than interpretivist review[66] and concludes: "To put it bluntly, one can better protect fundamental values and the integrity of democratic processes by protecting them than by guessing how other people meant to govern a different society a hundred or more years ago."[67]

Dean John Hart Ely, while expressing serious reservations about the

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61. *Id.* at 101 (emphasis added).

62. *Id.* at 102.

63. *Id.* at 123. Perry also maintains that we need not fear that the exercise of noninterpretive review will be inconsistent with representative democracy, because the judiciary is subject to significant political controls, the most important of which is the power of Congress to "define, and, therefore, to limit, the appellate jurisdiction of the Supreme Court and the original and appellate jurisdiction of the lower federal courts." *Id.* at 128.

64. Brest, *supra* note 28, at 226.

65. *Id.*

66. *Id.* at 228–34.

67. *Id.* at 238. Brest refers to his view of noninterpretive review as fundamental rights adjudication and has launched a strong attack on the critics of this view. He maintains that none of the critics' own theories can withstand the force of their criticisms: all of the theories "are vulnerable to similar criticisms based on their indeterminacy, manipulability, and, ultimately, their reliance on judicial value choices that cannot be 'objectively' derived from text, history, consensus, natural rights, or any other source." Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1096 (1981).

legitimacy of noninterpretive review generally,[68] proffers a functional justification for such review in certain areas. Noninterpretive review generally is of doubtful legitimacy, says Ely, because it "would have politically unaccountable judges select and define the values to be placed beyond majority control," permitting them to revise policy choices made by the electorally accountable branches of the government.[69] But when noninterpretive review would enhance the democratic process, that is, when it is participation oriented and representation reinforcing, then Ely contends that it can be functionally justified.[70] Ely maintains that the structure of the Constitution is process oriented[71] and that it therefore justifies a participation-oriented and representation-reinforcing approach to judicial review. He further contends that the judiciary is the proper agency to implement the participation-oriented and representation-reinforcing values:

> [A] representation-reinforcing approach to judicial review, unlike its rival value-protecting approach, is not inconsistent with, but on the contrary (and quite by design) entirely supportive of, the underlying premises of the American system of representative democracy . . . . [S]uch an approach, again in contradistinction to its rival, involves tasks that courts, as experts on process and (more important) as political outsiders, can sensibly claim to be better qualified and situated to perform than political officials.[72]

Under Ely's limited view of noninterpretive review, the federal judiciary can legitimately engage in noninterpretive review to police the process of representation, as in the reapportionment cases;[73] to clear the channels of political change, as in the voting rights cases and the first amendment area;[74] and to facilitate the representation of minorities, as in the equal protection cases in which the Court invalidates racial or gender discrimination and other discrimination based on identifiable group membership.[75] Predictably, Ely's compromise position and his limited view of noninterpretive review have

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68. *See generally* J. ELY, DEMOCRACY AND DISTRUST 43–72 (1980). Ely maintains that it is impossible to discover what have been called fundamental values in any of the sources relied on by proponents of fundamental rights adjudication. Thus, judges necessarily fall back on their own values in deciding what limitations the broadly phrased and open-ended provisions of the Constitution will impose. He notes: "If a principled approach to judicial enforcement of the Constitution's open-ended provisions cannot be developed, one that is not hopelessly inconsistent with our nation's commitment to representative democracy, responsible commentators must consider seriously the possibility that courts simply should stay away from them." *Id.* at 41. *See infra* note 136.

69. J. ELY, DEMOCRACY AND DISTRUST 7–8 (1980).

70. *Id.* at 101–04.

71. *Id.* at 88–101. For strong disagreement with Ely's view on the process-oriented nature of the Constitution, see Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980). Tribe notes: "One difficulty that immediately confronts process theories is the stubbornly substantive character of so many of the Constitution's most crucial commitments: commitments defining the values that we as a society, acting politically, must respect." *Id.* at 1065. Tribe also maintains that the participation-oriented and representation-reinforcing approach to judicial review that Ely advocates "requires a theory of values and rights as plainly substantive as, and seemingly of a piece with, the theories of values and rights that underlie the Constitution's provisions addressing religion, slavery, and property." *Id.* at 1069.

72. J. ELY, DEMOCRACY AND DISTRUST 88 (1980).

73. *See id.* at 73–104.

74. *See id.* at 105–34.

75. *See id.* at 135–80.

come under strong attack from both the interpretivists and the noninterpretivists, who agree that the distinction he makes between process-oriented review and value-oriented review is untenable. The interpretivist critics say that the arguments he makes against noninterpretivist review generally apply equally to noninterpretivist review designed to achieve both participation-oriented and representation-reinforcing objectives,[76] while the noninterpretivist critics say that the arguments Ely makes in favor of his limited version of noninterpretivism undercut the arguments he makes against noninterpretivist review generally.[77]

The other category of justification is the consistency justification. Here noninterpretivist review is considered to be consistent with, or at least not inconsistent with, the general intention of the framers in promulgating the Constitution and in adopting its particular provisions. Professor Thomas Grey maintains that an unwritten constitution exists in addition to the written Constitution.[78] He says that "in the framing of the original American Constitutions it was widely accepted that there remained unwritten but still binding principles of higher law. The ninth amendment is the textual expression of this idea in the federal Constitution."[79] He then says that "[a]s it came to be accepted that the judiciary had the power to enforce the commands of the written Constitution when these conflicted with ordinary law, it was also widely assumed that judges would enforce as constitutional restraints the unwritten natural rights as well."[80] Grey further contends that a natural rights constitutional theory "was the formative theory underlying [section one] . . . of the fourteenth amendment"; accordingly, the fourteenth amendment "is . . . properly seen as a reaffirmation and reenactment in positive law of the principle that fundamental human rights have constitutional status."[81] Therefore, he concludes:

> [T]here was an original understanding, both implicit and textually expressed, that unwritten higher law principles had constitutional status. From the very beginning, and continuously until the Civil War, the courts acted on that understanding and defined and enforced such principles as part of their function of judicial review. Aware of that history, the framers of the 14th amendment reconfirmed the original understanding through the "majestic generalities" of section I. And ever since, again without significant break, the courts have openly proclaimed and enforced unwritten constitutional principles.[82]

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76. *See, e.g.*, Grano, *Ely's Theory of Judicial Review: Preserving the Significance of the Political Process*, 42 OHIO ST. L.J. 167 (1981). Grano, nonetheless, maintains that Ely has made a very important contribution to constitutional theory by setting forth the "view that the political arena is generally the place to settle issues of policy and morality." *Id.* at 184.

77. *See, e.g.*, Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981). Brest concludes: "[I]n his heroic attempt to establish a value-free mode of constitutional adjudication, John Hart Ely has come as close as anyone could to proving it can't be done." *Id.* at 142.

78. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

79. *Id.* at 716.

80. *Id.*

81. *Id.*

82. *Id.* at 717.

Consequently, under Grey's view of original understanding[83] noninterpretive review is legitimate because it is fully consistent with the intention of the framers that the Constitution embody both unwritten higher law principles and the textual limitations on governmental power.

Dean Terrance Sandalow, in a particularly valuable work on constitutional interpretation,[84] concentrates primarily on describing how the Supreme Court has defined the meaning of the Constitution in light of changing circumstances and changing values. Simultaneously, however, he has in effect provided a justification for noninterpretive review. Sandalow notes that constitutional decision making "has not been confined to a process of discovering the specific intentions of the framers."[85] That our Constitution is intended to endure provides the most persuasive reason that constitutional decision making cannot be based on the specific intentions of the framers, since "the questions for which subsequent generations have sought answers in the Constitution have been the questions of those generations."[86]

Sandalow, in effect, finds a justification for noninterpretive review in the general intention of the framers, most particularly their intention that the Constitution was meant to be an enduring document. Accordingly, the meaning of particular constitutional provisions may properly change from one generation to another.[87] He observes:

> The insight that intentions can be understood in general terms has played an important role in the development of constitutional law, for it has provided a means by which to mediate between the belief that the meaning of the Constitution ought to be found in the intentions of the framers and the need to accommodate the Constitution to changing circumstances and values.[88]

Since the focus is on the general intention of the framers, Sandalow maintains that the Court has acted properly in not limiting the framework of constitutional decision making to values constitutionalized by the framers. "[T]he values to which constitutional law gives expression are more nearly those of the present than those of the past."[89] The equal protection clause, for example, "can be understood as proscribing not only certain practices directed against blacks, with which the draftsmen were immediately concerned, but also all other practices that arbitrarily distinguish among classes of individuals."[90] In other words, he views the equal protection clause as embody-

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83. Grey has subsequently tried to demonstrate that the Constitution was intended to embody natural law thinking, but has concluded that further research is necessary before the matter can be definitively resolved. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978). In contrast, Perry maintains that "[t]he historical record simply does not support the proposition that the Framers constitutionalized natural law." Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 267 (1981).

84. Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981).

85. *Id.* at 1035.

86. *Id.*

87. For discussion and examples, see *id.* at 1038–55.

88. *Id.* at 1036.

89. *Id.* at 1039.

90. *Id.* at 1036.

ing a guarantee of equality of treatment. Thus, consistent with the general intention of the framers, that clause can be relied on to invalidate all arbitrary classifications and distinctions.[91]

Sandalow places a great deal of emphasis on the Constitution as a document intended to endure and on the need to shape constitutional law to current values. Constitutional decision making is limited, he argues, but the limits "are not those imposed by the language and pre-adoption history of the Constitution."[92] They "are those that have developed over time in the ongoing process of valuation that occurs in the name of the Constitution . . . they are the elements of reason that are intrinsic to the process of determining whether a proposed interpretation truly reflects those values."[93] He concludes: "Constitutional law thus emerges not as exegesis, but as a process by which each generation gives formal expression to the values it holds fundamental in the operation of government. The intentions of the framers describe neither its necessary minimal content nor its permissible outer boundaries."[94]

Professors Munzer and Nickel take a similar position by viewing the Constitution as susceptible of growth.[95] They say that "our constitutional system is a unique, intricate product of text and institutional practice,"[96] that "authoritative interpretation can modify the meaning of the Constitution, and that the present content of the document results from the interaction over time of framers, judges, legislatures, and executive officials," a process that produces change in "the meaning of the Constitution itself."[97] Thus, the "Constitution is . . . not merely a written instrument . . . but a text-based institutional practice in which authoritative interpreters can create new constitutional norms."[98] Munzer and Nickel analogize the Constitution to a living organism that grows.

> *Growth* is a kind of natural, gradual, ordered, predictable change that occurs within an organism whose identity remains constant. Change of this sort is in accordance with the nature of the organism; it is provided for in the "program." To see constitutional change in this way is to put it in a favorable light. It is to see it as the sort of natural and gradual development that was anticipated by the framers.[99]

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91. To ask, in each instance, whether the framers "intended" the specific or the general is to pose a question that almost invariably is unanswerable. The question assumes that they intended one or the other, but not both. But the issues did not arise for the framers in a way that forced such a choice: they could have intended both simultaneously because, viewing them as compatible, they had no reason to choose between them.

Id.

92. *Id.* at 1054.

93. *Id.* at 1054–55.

94. *Id.* at 1068.

95. Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029 (1977).

96. *Id.* at 1030.

97. *Id.* at 1042.

98. *Id.* at 1045.

99. *Id.* at 1046.

In summary, under this view noninterpretive review is consistent with the general intention of the framers because noninterpretive review is necessary to constitutional growth and because constitutional growth was anticipated by the framers.

D. *The Futility of the Legitimacy Debate*

It should be clear by now that the interpretivist and noninterpretivist views of legitimacy are completely irreconcilable because they proceed on totally different underlying premises. The noninterpretivist position assumes that the Constitution is a living document and that its meaning must change to give expression to the fundamental values of each generation. In this sense the functional and general intention justifications for noninterpretive review blend. According to Grey, "Our characteristic contemporary metaphor is 'the living Constitution'—a constitution with provisions suggesting restraints on government in the name of basic rights, yet sufficiently unspecific to permit the judiciary to elucidate the development and change in the content of those rights over time."[100]

Grey recognizes that this view of constitutional adjudication, and of the Court's role in that process, is "at war with the pure interpretive model."[101] Under the interpretive model "[t]he amendment process was the framers' chosen and exclusive method of adopting constitutional values to changing times; the judiciary was to enforce the Constitution's substantive commands as the framers meant them."[102] Or, as Grano would say, the judiciary is authorized under article III to enforce only those values that the framers constitutionalized, and if other values are to be embodied in the Constitution it must be done through constitutional amendment.[103]

The interpretivist position would reject the functional justification for noninterpretive review on the ground that no matter what functional benefits may derive from noninterpretive review, that review is simply not authorized by the Constitution. When the Court engages in noninterpretive review it acts in a manner that is inconsistent with the judicial function envisaged by the framers. The interpretivist position would also reject the general intention justification on the ground that it cannot be supported by historical evidence: we have no historical evidence that the general intention of the framers was to permit the judiciary to constitutionalize values that the framers had not constitutionalized and to engage in noninterpretive review. Grano contends that in a Constitution of enumerated powers the burden is on the proponents of noninterpretive review [104] to demonstrate that "the framers, who had taken

100. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 709 (1975).

101. *Id.*

102. *Id.*

103. Grano, *supra* note 6, at 8, 16–17, 64. Grano believes, however, that we should "oppose constitutional amendments that reflect contemporary moral judgments and instead should permit our progeny freedom to determine their own morality." *Id.* at 8.

104. *Id.* at 17.

the extraordinary step of adopting a constitution as a species of positive law, intended the judiciary to have . . . broad authority" to invalidate legislation by invoking nonpositivistic moral principles.[105] Grano concludes that the weight of historical evidence does not support this position.[106]

Finally, the interpretivists would reject both the functional and general intention justification on the ground that noninterpretive review is inconsistent with the rationale for judicial review in our constitutional scheme. This criticism recalls the purported tension between noninterpretive review and representative democracy. If judicial review can be justified at all, say the interpretivists, it is because the judiciary is enforcing the limitations that the Constitution places on electorally accountable policy making. Those limitations reflect values constitutionalized by the framers, and only those values can properly be relied on to invalidate electorally accountable policy making.[107]

The functional noninterpretivists say that judicial review is justified, despite the purported tension between noninterpretive review and representative democracy, precisely because of the functional necessity of that kind of review.[108] The general intention noninterpretivists are not concerned about whether specific historical evidence exists to show that the framers intended the judiciary to exercise noninterpretive review, because they consider that the exercise of that review is consistent with the general intention of the framers.

The legitimacy debate then turns out to be futile because each side disputes the underlying premises on which the position of the other side is based. Since the disputants disagree on the underlying premises of legitimacy, the debate cannot be objectively resolved, at least according to the terms on which, thus far, it has proceeded.

The remainder of this Article offers a different perspective on the issue of legitimacy, a perspective that results primarily from an analysis of the institutional behavior of the Supreme Court in constitutional adjudication.

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105. *Id.* at 16.

106. *Id.* The absence of historical evidence indicating that the framers intended to authorize the courts to undertake noninterpretive review is also conceded by Perry. "There is no plausible . . . historical justification for constitutional policy making by the judiciary . . . ." PERRY, *supra* note 4, at 24. Likewise, Professor Kent Greenawalt has contended:

> Beyond the obvious fact that the framers often meant to state broad principles rather than precisely defined legal rules, I am not aware of historical evidence that they adverted to the possibility that later values would supplant their own or that they regarded it as a positively desirable feature of the Constitution that their own views about specific practices might be overridden.

Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 1016 (1978).

107. According to Bork:

> It follows that the choice of "fundamental values" by the Court cannot be justified. Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights.

Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971).

108. *See supra* notes 57–77 and accompanying text.

III. NONINTERPRETIVE REVIEW AND THE INSTITUTIONAL BEHAVIOR OF THE SUPREME COURT

The introduction of this Article suggested that the Supreme Court's institutional behavior in constitutional adjudication provides guidance on the question of the legitimacy of noninterpretive review, that the Court has long ago resolved the legitimacy question, and that its resolution of that question would be reflected by a consistent pattern of institutional behavior. It further suggested that once the Court's own view about the nature of its function in constitutional adjudication is fully understood, we will gain some insights into the academic debate over the legitimacy of the Court's actions. This portion of the Article analyzes the Court's actions and their relationship to the Court's view of its function in constitutional adjudication. In the Court's perception of that function, noninterpretive review is not only legitimate, but is also a necessary postulate of constitutional adjudication under the Constitution. The final portion of this Article offers a different perspective on the legitimacy debate based on the conclusions that follow from an analysis of the Court's institutional behavior.

If the interpretivists and the noninterpretivists agree on anything, it is that the Supreme Court has not adhered to even the broadest form of interpretive review.[109] According to Perry, "The decisions in virtually all modern constitutional cases of importance . . . cannot plausibly be explained except in terms of noninterpretive review, because in virtually no such case can it plausibly be maintained that the framers constitutionalized the determinative value judgment."[110] Bork, after setting forth the criteria for legitimacy under the interpretivist position, states that "[c]ourts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution."[111] He then concludes:

> It follows, of course, that broad areas of constitutional law ought to be reformulated. Most obviously, it follows that substantive due process . . . is and always has been an improper doctrine . . . .
>
> The argument so far also indicates that most of substantive equal protection is also improper. The modern Court, we need hardly be reminded, used the equal protection clause the way the old Court used the due process clause. The only change was in the values chosen for protection and the frequency with which the Court struck down laws.[112]

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109. The broadest form of interpretive review is the view espoused by Grano. *See supra* text accompanying notes 13–17 & 29–51.

110. PERRY, *supra* note 4, at 11. The case is overstated here in the sense that Perry is referring to the specific intentions of the framers. This reference is reflected in his use of the term "determinative value judgment." Grano has demonstrated that if the normative criteria are values constitutionalized by the framers rather than their determinative value judgments, at least some of the modern constitutional cases of importance, such as *Brown* and the other racial discrimination cases, can be supported under interpretive review. Grano, *supra* note 6, at 67–73.

111. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 10–11 (1971).

112. *Id.* at 11. *See also* Grano, *supra* note 6, at 25–29.

Echoing Bork in this regard, though with approval rather than disapproval, Sandalow points out that "'[s]ubstantive equal protection,' like 'substantive due process,' is nevertheless of continuing significance, providing the means by which the Court may protect interests that have come to be viewed as fundamental but that cannot easily be read into more specific constitutional provisions limiting governmental power."[113]

It would be redundant to continue the litany. While examples of noninterpretive review appear in other areas, they appear most clearly in the Court's treatment of the due process and equal protection clauses. From *Lochner* to *Roe,* from economic freedom to fundamental personal rights, from the protection of aliens to the protection of women, the Court clearly has not seen its function in constitutional adjudication to be limited to implementing the values constitutionalized by the framers. The Court itself has infused values into the open-ended concepts of due process and equal protection. It has long given due process a substantive meaning and has long held that the equal protection clause protects all persons from arbitrary and unfair discrimination. It has used these provisions to impose substantial limitations on governmental power, going far beyond the intentions of the framers.[114]

More significant, perhaps, for our present purposes, the Court has never indicated that it recognized any distinction between interpretive and noninterpretive review. The Court has not acted any differently when it based its decision on a constitutional question on the specific intention of the framers[115] than when it based its decision on values that the Court itself had infused into particular provisions of the Constitution to invalidate a value choice made by an electorally accountable body.[116] Nor has the Court ever seen the need to discuss the legitimacy of its actions and the reasons it is not constrained in constitutional adjudication by values purportedly constitutionalized by the framers. Consequently, the Court has followed a consistent pattern of institutional behavior.

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113. Sandalow, *Constitutional Interpretation,* 79 MICH. L. REV. 1033, 1053 (1981).

114. *See infra* notes 139–58 and accompanying text. This Article does not discuss the relationship of either the ninth amendment or the privileges and immunities clause of the fourteenth amendment to the legitimacy of noninterpretive review. Ely maintains that these provisions reflect the framers' intention that individuals should have constitutional rights beyond those specified. Thus, these provisions justify noninterpretive review. J. ELY, DEMOCRACY AND DISTRUST 22–30, 34–38 (1980). The Court, however, effectively precluded the privileges and immunities clause from being a significant limitation on governmental action in The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873). *See* Madden v. Kentucky, 309 U.S. 83, 91–92 (1940). While three Justices relied on the ninth amendment in Griswold v. Connecticut, 381 U.S. 479 (1965), to support the newly found right of privacy, this right was incorporated into substantive due process in Roe v. Wade, 410 U.S. 113 (1973), and the ninth amendment has not surfaced again as a limitation on governmental action. Once the Court imputed a substantive meaning to due process and relied on the due process clause to invalidate governmental action interfering with individual rights, the debate over whether the privileges and immunities clause or the ninth amendment could be a source of protection for individual rights became purely academic.

115. *See, e.g.*, Williams v. Florida, 399 U.S. 78, 99 (1970) ("[t]here is absolutely no indication in the 'intent of the Framers' " that the sixth amendment's guarantee of trial by jury necessarily required that a jury consist of twelve persons); Wesberry v. Sanders, 376 U.S. 1 (1964) (framers intended by adoption of article I, § 2 that apportionment of representation in United States House of Representatives should be based strictly on principle of equal representation for equal numbers of people).

116. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973), and Lochner v. New York, 198 U.S. 45 (1905).

The Court's institutional behavior as it bears on the legitimacy question is best illustrated by the majority and dissenting opinions in *Moore v. City of East Cleveland.*[117] There the Court held that a municipal zoning ordinance violated due process since it prohibited a grandmother from residing in a household with her two grandchildren who were cousins rather than siblings.[118] Professor Grano cites *Moore* as the epitome of all that is wrong with noninterpretive review: "[F]reed from the need to use the written Constitution as a source of judgment, noninterpretivist judges may select any source that is personally appealing."[119]

Moore appears to be the only recent case in which any of the Justices has even alluded to the legitimacy question,[120] that is, to the question whether it was legitimate for the Court to engage in noninterpretive review. Justice White did so in his dissent, and his discussion of the question is most instructive. Justice White, who disagreed strongly with the Court's reliance on substantive due process in this case to invalidate the application of the zoning law to Mrs. Moore and her grandchildren, discussed the meaning that the Court had previously given to the due process clause. He began by noting that "the emphasis of the Due Process Clause is on 'process' . . . [and that it had been] 'ably and insistently argued in response to what were felt to be abuses by this Court of its reviewing power,' that the Due Process Clause should be limited 'to a guarantee of procedural fairness.'"[121] He further argued, however, that the Court had long held that the due process clause has both a substantive and a procedural content,[122] which all the Justices had recognized even if they

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117. 431 U.S. 494 (1977).

118. *Id.* at 499.

119. Grano, *supra* note 6, at 27. Again, when Grano refers to the written Constitution he is referring to values purportedly constitutionalized by the framers.

120. Professor Grano's investigations called this discussion to my attention and have not revealed any other case in which the legitimacy question was discussed. *See* Grano, *supra* note 6, at 27 n.117.

121. 431 U.S. 494, 542 (1977) (White, J., dissenting) (quoting Poe v. Ullman, 367 U.S. 497, 540 (1961) (Harlan, J., dissenting)).

122. 431 U.S. 494, 542 (1977) (White, J., dissenting). In The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 80–81 (1873), the Court summarily rejected the due process challenge without expressly indicating that it considered the clause to have a substantive content. The Court referred to state court interpretations of due process clauses in state constitutions, at least some of which had given the clauses a substantive meaning (*see, e.g.*, Wynehamer v. People, 13 N.Y. 378, 398 (1856) (intemperance act is an unconstitutional deprivation of property in the form of alcoholic beverages)), and simply stated that

> [u]nder no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the state of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 81 (1873).

Substantive due process could have been the only constitutional basis for the decision in Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1875), in which the Court, without referring to the Constitution, struck down a tax that financed a bonus to attract a private manufacturer to a city. The Court clearly recognized that due process had a substantive meaning in cases such as Munn v. Illinois, 94 U.S. 113 (1876), and Mugler v. Kansas, 123 U.S. 623 (1887), in which it upheld state regulatory laws against due process challenges. In Allgeyer v. Louisiana, 165 U.S. 578 (1897), the Court invoked substantive due process to invalidate a state regulation of insurance transactions entered into by out-of-state insurance companies. Finally, in Holden v. Hardy, 169 U.S. 366 (1898), the Court sustained a state law regulating hours of labor in underground mines and smelters against a due process challenge. It is clear, therefore, that the Court treated the due process clause as having a substantive content in the years between *Slaughterhouse* and *Lochner*, although it generally sustained state regulatory laws against due process challenges.

disagreed on precisely how they should determine that substantive content.[123] At this point Justice White alluded to the matter of legitimacy:

> Although the Court regularly proceeds on the assumption that the Due Process Clause has more than a procedural dimension, we must always bear in mind that the substantive content of the Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments. This is not to say that these cases should be overruled, or that the process by which they were decided was *illegitimate or even unacceptable*, but only to underline Mr. Justice Black's constant reminder to his colleagues that the Court has no license to invalidate legislation which it thinks merely arbitrary or unreasonable.[124]

Justice White's allusion to the matter of legitimacy in the context of the Court's giving due process a substantive content made it clear that the Court had no doubt that it was acting legitimately when it did so or when it otherwise engaged in noninterpretive review. Recall that Justice White himself invoked substantive due process as the doctrinal basis for invalidating the Connecticut anticontraception law in *Griswold v. Connecticut*.[125] Even Justice Rehnquist, who regularly rails against the Court's reaching results that would have surprised the framers,[126] has never suggested that those results were somehow illegitimate.

The point to emphasize here is that while the Court in *Moore* was sharply divided over the application of substantive due process doctrine in that case, no Justice on the Court has ever disputed that it was legitimate for the Court to have imputed a substantive meaning to the due process clause.[127] In the only recent case, then, in which any member of the Court alluded to the

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123. 431 U.S. 494, 542–43 (1977) (White, J., dissenting).

124. *Id.* at 543–44 (emphasis added).

125. 381 U.S. 479, 502 (1965) (White, J., concurring).

126. *See, e.g.*, Carey v. Population Serv. Int'l, 431 U.S. 678, 717 (1977) (Rehnquist, J., dissenting). If those responsible for [the Bill of Rights and the Civil War Amendments] . . . could have lived to know that their efforts had enshrined in the Constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors through such means as window displays and vending machines located in the men's room of truck stops, notwithstanding the considered judgment of the New York Legislature to the contrary, it is not difficult to imagine their reaction.

127. The most for which Justice White argued was that the Court should proceed with some degree of caution when it engaged in noninterpretive review and that it should not invalidate the challenged law or governmental action as readily as it would when it engaged in interpretive review. He stated: "The Judiciary, including this Court, is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution." 431 U.S. 494, 544 (1977) (White, J., dissenting). Justice Powell responded to this argument:

> Substantive due process has at times been a treacherous field for this Court. There *are* risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment. . . .
>
> Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful "respect for the teachings of history [and] solid recognition of the basic values that underline our society."

Id. at 502–03 (emphasis in original).

legitimacy question, that Justice had no doubt that noninterpretive review was fully legitimate.

Next, consider the relationship of noninterpretive review to the Court's consistent pattern of institutional behavior in constitutional adjudication. The Court's institutional behavior does not indicate that the Court recognizes any distinction between interpretive and noninterpretive review. The reason is that both the Court's view of its function in constitutional litigation and its actions in deciding a constitutional question make that distinction completely irrelevant. The Court views its function in constitutional adjudication as defining the meaning of the Constitution and applying the provisions of the Constitution, as they have been defined by the Court, to the challenged law or governmental action. In the generic sense of the term, the Court is interpreting the Consitution every time it passes on a constitutional question. Thus, it invalidates laws or governmental action by interpreting the Consitution or by referring to its definition of the consitutional provisions and their application to the challenged law or governmental action.[128]

While this description of the Court's actions in constitutional adjudication may seem rather obvious, it is quite important in explaining why the Court has never drawn any distinction between interpretive and noninterpretive review. The Court views its function as establishing the meaning of all of the provisions of the Constitution,[129] and it does not distinguish between kinds of review when it is engaged in performing this function.

How the Court defines a particular constitutional provision depends, in large part, on the nature of that provision. Some provisions, such as those setting forth the requirements for election of a representative or senator,[130] convey a precise meaning from the text alone. This is also true of some provisions imposing limitations on governmental power in order to protect individual rights, such as the prohibition on ex post facto laws.[131] Because the meaning of that provision is very clear from the text alone, no further elaboration of its meaning by the Court is needed, and it is not difficult to apply that provision to a law claimed to violate it.[132]

The prohibitions contained in some other provisions of the Constitution

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128. This Article uses the terms "define" or "establish the meaning of" rather than the term "interpet," which the author would prefer, because the word "interpret" has a connotation connected with interpretive review. Analytically, the Court is deciding what meaning it will attach to the various constitutional provisions and is determining the circumstances under which it will hold that a particular governmental action violates those provisions.

129. This function includes the internal inferences that follow from the document as a whole and limit the exercise of governmental power. The right to interstate travel is a right that derives from those internal inferences. *See* Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868). *See generally* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

130. U.S. CONST. art. I, § 2, cl. 2; *id.*, § 3, cl. 5.

131. *Id.*, § 9, cl. 3; *id.*, § 10, cl. 1.

132. The issue in an ex post facto challenge is whether the law imposes a punitive sanction for past conduct that was lawful when performed. *See, e.g., Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866). If the law does not impose a punitive sanction for past conduct, it does not violate the ex post facto clause, although past conduct is the basis for the law's application. *See, e.g.*, Hawker v. New York, 170 U.S. 189 (1898).

are also fairly specific, such as the prohibition against bills of attainder. The term "bill of attainder" had a well-defined meaning at the time the Constitution was adopted, and the prohibition was directed against a particular kind of practice with which the framers were familiar. That provision can be applied to a current practice by analogizing that practice to the practice with which the framers were familiar and which they intended to prohibit by adopting that provision.[133]

The meaning of some other provisions is also fairly clear from the text alone, and the only problem is their application in particular circumstances. The seventh amendment, for example, guarantees the right to trial by jury in "suits at common law."[134] The Court applies that provision by examining the components of a "suit at common law" at the time the seventh amendment was adopted and by deciding whether the present proceeding, in which the defendant claims a right to trial by jury, has essentially the same characteristics as the historical "suit at common law."[135]

In the above examples, the Court did not go beyond the text of the provision in defining it because there was no need to do so. The provision was a narrow one, and the text adequately conveyed its meaning. In light of that meaning, derived from the text, the Court decided whether the provision prohibited a particular practice.

Many provisions of the Constitution limiting governmental power in order to protect individual rights are not narrow, however, and their meaning cannot remotely be conveyed by the text alone. Quite to the contrary, these provisions are often broadly phrased and open ended; they can best be described as majestic generalities. These provisions require massive definition to operate effectively as limitations on governmental power—as the framers who promulgated them intended.[136] The first and fourteenth amendments, for example, are all majestic generalities. So are some of the other provisions of the Bill of Rights. Even provisions that are not framed in majestic generalities, such as the sixth amendment's guarantee of a speedy and public trial,[137] are sufficiently indeterminate in meaning to require a great deal of definition.[138]

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133. *See, e.g.*, United States v. Brown, 381 U.S. 437 (1965); United States v. Lovett, 328 U.S. 303 (1946).

134. U.S. CONST. amend. VII.

135. *See, e.g.*, Pernell v. Southall Realty, 416 U.S. 363 (1974); Curtis v. Loether, 415 U.S. 189 (1974). *See also* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (application of collateral estoppel doctrine does not violate seventh amendment).

136. Dean Ely suggests: "If a principled approach to judicial enforcement of the Constitution's open-ended provisions cannot be developed, one that is not hopelessly inconsistent with the nation's commitment to representative democracy, responsible commentators must consider seriously the possibility that courts simply should stay away from them." J. ELY, DEMOCRACY AND DISTRUST 41 (1980). However, Chief Justice Marshall observed in *Marbury*: "It cannot be presumed that any clause in the Constitution is intended to be without effect . . . ." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803). When massive definition is necessary to ensure that these provisions operate effectively as limitations on governmental power, the judiciary must supply that massive definition since it is the responsibility of the federal judiciary to establish the meaning of all of the provisions of the Constitution.

137. U.S. CONST. amend. VI.

138. *See, e.g.*, Gannett Co. v. DePasquale, 443 U.S. 368 (1979); Barker v. Wingo, 407 U.S. 514 (1972).

Accordingly, constitutional adjudication is concerned with defining and applying constitutional provisions, many of which are broadly phrased and open ended and so do not convey much meaning in their text alone. The Court has done this ever since *Marbury* asserted and recognized the power of judicial review.[139] In establishing the meaning of the Constitution the Court has not recognized any distinction between interpretive and noninterpretive review.

In establishing the meaning of the Constitution and in applying its provisions in particular circumstances, the Court has been very eclectic. Sometimes the Court has taken a strictly historical approach, looking to the meaning of a constitutional provision as it was understood by the framers when it was adopted,[140] or looking to the specific intentions of the framers to determine whether that provision protected a particular activity.[141] At other times the Court has defined the constitutional provisions on the basis of internal inferences that follow from the structure of the Constitution: for example, when it interpreted the affirmative grant of the commerce power to Congress to include, by negative implication, limitations on the power of the states to regulate interstate commerce;[142] or when it found that the right of interstate travel is a basic, generic right "fundamental to the concept of our Federal Union."[143]

At still other times the Court has looked to the "broad, organic purpose"[144] of a constitutional provision to justify extending constitutional protection to an individual right, such as the right to interracial marriage, that the framers probably did not perceive as being protected by that provision when it was promulgated.[145] In other contexts the Court has made significant value judgments in defining a particular constitutional provision—for example, in determining whether the free exercise clause was meant to protect practices based on religious beliefs or only the profession of religious beliefs.[146]

In defining the broadly phrased and open-ended provisions of the Constitution—the majestic generalities—the Court has not felt constrained to search

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139. 5 U.S. (1 Cranch) 137 (1803).

140. *See supra* note 110.

141. In Roth v. United States, 354 U.S. 476 (1957), the Court held that obscene speech was not within the protection of the first amendment, on the ground that there was "sufficient contemporaneous evidence to show that [at the time of the adoption of the first amendment] obscenity . . . was outside the protection intended for speech and press." *Id.* at 483.

142. *See* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851). *See generally* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 19–22 (1969).

143. United States v. Guest, 383 U.S. 745, 757 (1966). *See also* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 15–17, 27–29 (1969).

144. Loving v. Virginia, 388 U.S. 1, 9 (1967).

145. 388 U.S. 1 (1967).

146. *Compare* Reynolds v. United States, 98 U.S. 145 (1879) (religious practice of bigamy is not constitutionally protected). *with* Cantwell v. Connecticut, 310 U.S. 296 (1940) (efforts to persuade passersby to buy a book or contribute money in the interest of religion constitutionally protected). While the free exercise clause embodies an "absolute prohibition of infringements on the 'freedom to believe,' " it requires a delicate balancing when the infringement is directed at acts and conduct based on religious beliefs. McDaniel v. Paty, 435 U.S. 618, 627 (1978).

for values purportedly constitutionalized by the framers. Since the Court has the responsibility to establish the meaning of those provisions,[147] it has never doubted that it was acting legitimately when, in the process of defining those provisions, it made the appropriate value judgments and the necessary value infusions. For example, although the primary concern of the framers of the fourteenth amendment's equal protection clause may have been to prevent discrimination against the newly emancipated blacks, the Court has defined that clause by referring to the text—"[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws"[148]—and has held that the clause protects all persons against arbitrary and invidious discrimination.[149] Thus, the equal protection clause has been interpreted to prohibit discrimination on the basis of alienage,[150] illegitimacy,[151] and gender;[152] to prohibit disadvantaging poor persons in certain ways;[153] and to impose limits on the power of the government to classify, particularly when the classifications impinge on fundamental rights.[154] So, too, while the framers of the fifth and fourteenth amendment's due process clause may have seen the clause as embodying only a guarantee of procedural fairness, [155] the Court, in defining that clause, has focused on the terms "liberty" and "property" and

147. "It is emphatically the province and the duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). *See also* United States v. Nixon, 418 U.S. 683 (1974). The Court stated in Cooper v. Aaron, 358 U.S. 1, 18 (1957): "In 1803, [*Marbury*] . . . declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." The duty to say what the law is includes the responsibility to define all the provisions of the Constitution, including those that are broadly phrased and open ended. *See also supra* note 136.

148. U.S. CONST. amend. XIV, § 1.

149. The Court's definition of the equal protection clause in this manner is clearly illustrated by Yick Wo v. Hopkins, 118 U.S. 356 (1886). Although *Yick Wo* is often analyzed as a racial or national origin discrimination case, at the time it was decided the Court treated it as an alienage discrimination case. Yick Wo and most of the other Chinese launderers in San Francisco were subjects of China. The Court emphasized that their status as aliens could not justify the discrimination admittedly practiced against them.

> The rights of the petitioners, as affected by the proceedings of which they complain, are not less because they are aliens and subjects of the Emperor of China. . . .
>
> The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . . These provisions are universal in their application. . . . The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.

Id. at 369.

150. *Id.* at 356. *See also* Truax v. Raich, 239 U.S. 33 (1915).

151. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68 (1968).

152. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971).

153. *See, e.g.*, Tate v. Short, 401 U.S. 395 (1971) (it is denial of equal protection to fine those able to pay but to convert that fine to imprisonment for those who cannot); Douglas v. California, 372 U.S. 353 (1963) (it is denial of equal protection to deny counsel to indigent defendants taking an appeal as of right from their convictions).

154. The interests that receive a high degree of protection, such as reproductive freedom, marriage, and family interests, are now referred to as fundamental rights. General classifications, however, may also be invalid under the purportedly less restrictive rational basis standard of review. *Compare* Zobel v. Williams, 102 S. Ct. 2309 (1982) (Alaska's benefit distribution plan violated equal protection by discriminating on the basis of the length of residence in state), *with* Schweiker v. Wilson, 450 U.S. 221 (1981) (equal protection not violated by denial of Supplemental Security Income to individuals institutionalized in institutions that do not receive Medicaid funds).

155. This is the contention of the interpretivists. *See supra* notes 47–49 and accompanying text. Justice White made this point in *Moore*. *See supra* notes 121–24 and accompanying text.

has imputed a substantive meaning to that clause.[156] In so doing, the Court has necessarily had to infuse values into the due process clause[157]—the economic freedom value in the *Lochner* era and the personal freedom value in what the interpretivists would call the *Roe* era. On the basis of those value infusions the Court has decided whether particular laws or governmental actions violated due process. [158]

Analytically and behaviorally, the Court has defined the provisions of the Constitution and determined their applicability to particular laws or governmental action in light of those definitions. The Court did not act any differently when it engaged in noninterpretive review than when it engaged in interpretive review. It did not act any differently when it decided *Roe*, for example, than when it decided whether the sixth amendment's trial by jury guarantee required a jury of twelve persons.[159] Nor did it act any differently when it defined provisions of the Constitution at any time during its history. In all of these instances the Court was performing its constitutional function to "say what the law is."[160] To the extent that the Court made value judgments that may have been different from those supposedly made by the framers, and to the extent that it infused values into broadly phrased and open-ended provisions such as the due process and equal protection clauses instead of limiting itself to values purportedly constitutionalized by the framers in those clauses, the Court did not question the legitimacy of its actions. The Court was simply establishing the meaning of the Constitution, which is its long-recognized function in our constitutional system.

The Court has always rooted its constitutional decision making in the text or internal inferences of the Constitution. It has not claimed any power as the protector of moral values,[161] or as the purifier of representative democracy,[162] or as the institution best able to protect fundamental rights,[163] to override electorally accountable policy making, and to prescribe the fundamental policies and values of American society.[164] Rather, the Court has simply been

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156. *See supra* note 122.

157. The Court must do this to decide what kinds of interests would receive a high degree of protection under the due process clause.

158. Even after the Court makes value infusions, it must also make what may be called specific value judgments to determine whether a particular law or governmental action is inconsistent with the values the Court has infused into the due process clause. Sometimes this determination requires the Court to decide whether a particular individual interest that reflects those values is constitutionally more important than the asserted governmental interest relied on to restrict the individual interest. This kind of constitutional balancing lies at the heart of much due process adjudication. *Roe v. Wade*, for example, cannot be explained on any other basis than constitutional balancing: the Court concluded that the pregnant woman's interest in reproductive freedom, or the right to terminate an unwanted pregnancy before the stage of viability, was constitutionally more important than the state's interest in protecting potential human life from the moment of conception. 410 U.S. 113, 147–56, 166 (1973).

159. *See* Williams v. Florida, 399 U.S. 78 (1970).

160. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). *See also supra* note 147.

161. This is Perry's justification for noninterpretive review. *See supra* notes 59–63 and accompanying text.

162. This is Ely's justification for noninterpretive review when it is participation oriented and representation reinforcing. *See supra* notes 71–75 and accompanying text.

163. This is Brest's justification for noninterpretive review. *See supra* notes 64–67 and accompanying text.

164. This is Grano's description of the Court's activities when it engages in noninterpretive review. *See supra* notes 29–50 and accompanying text.

establishing the meaning of the Constitution and determining its application to laws or governmental action challenged as violating the Constitution. Precisely because the Constitution contains so many broadly phrased and open-ended provisions, the Court, in defining those provisions, has not hesitated to engage in noninterpretive review.

In other words, the Court apparently believes that it is acting legitimately as long as it looks to the text or internal inferences of the Constitution as the starting point for its constitutional decisions.[165] The Court likewise apparently believes that it is acting legitimately when, in the process of defining broadly phrased and open-ended limitations on governmental power contained in the Constitution, it goes beyond values purportedly constitutionalized by the framers. It has not looked to these criteria as the sole or even the primary source of meaning for the Constitution or for its application to particular situations at a much later time in the Nation's history. The Court has not viewed interpretive review as a tenable methodology for determining the meaning and application of the Constitution. Rather, it has viewed noninterpretive review as a necessary postulate for constitutional adjudication under the Constitution. The Court, therefore, has engaged in noninterpretive review throughout its history, convinced that its actions were legitimate and consistent with the Court's function under our constitutional system.

Noninterpretive review, however, does not imply a complete absence of constraint on constitutional decision making. Constraints on constitutional decision making inhere in the nature of the judicial process and in the Court's concern that it perform its constitutional function in a manner that will not diminish public respect for, and acceptance of, that function.

Constitutional decision making, like any other judicial decision making, operates within a recognized judicial framework. In making constitutional decisions the Court refers to the facts of particular cases. It considers precedents, even if it does not always follow them. The Court tries to set forth a well-reasoned elaboration for the bases of its decisions, and its decisions in one case build on, and are related to, decisions in other cases. Sandalow has observed: "The meaning that we give to them [constitutional provisions] . . . must take account of the 'line of their growth.'"[166] The meaning of a

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165. "A decision limiting governmental power must be grounded in a limitation on governmental power contained in the Constitution." Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1050 (1981). Similarly, Munzer and Nickel have stated:

> Though the Constitution is a complex union of text and institutional practice, the text is still sufficiently central to this practice to make a suitable relation to the text the key to constitution-identity. Our basic contention, roughly stated, is that a rule or decision is part of our constitutional law just in case it is found in the text or stands in ancestral relation to the text. Ancestry obtains when there is an interpretation of the text, or a chain of interpretations at least one of which is eventually tied to the text, which yields the rule or decision.

Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1054 (1977).

166. Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1054 (1981) (quoting Gompers v. United States, 233 U.S. 604, 610 (1914)).

constitutional provision develops incrementally, and that provision's line of growth strongly influences its application in particular cases.[167] The framework within which constitutional decision making has operated, then, is a significant constraint on the results that the Court will reach when it is engaged in that decision making.[168]

The Court views its constitutional function as establishing the meaning of the Constitution and enforcing the Constitution's limitations on the exercise of governmental power. As it performs that function the Court realizes that it must not dilute the strength of the Constitution's limitations by too readily invalidating governmental action that does not interfere with important individual rights.[169] Since invalidating governmental action on constitutional grounds is a serious matter, the Court will always exercise that power with restraint, recognizing that the Constitution must not be trivialized by its too casual application. Likewise, the Court understands that there are limits on

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167. For over four decades the Supreme Court's approach to the constitutionality of governmental regulation of enterprise activity under the due process clause has been to give great deference to governmental economic regulation generally, even when the regulation affects individual property rights rather than enterprise activity. *See, e.g.*, Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978). This deference is consistent with seeing the line of growth of the due process clause as a limitation on governmental power in the economic regulation area. Similarly, the Court's protection of reproductive freedom, whether under the rubric of equal protection, right of privacy, or substantive due process, can be traced in a line of progression from Skinner v. Oklahoma, 316 U.S. 535 (1942) (statute that allowed sterilization of certain habitual criminals violated equal protection clause), through Griswold v. Connecticut, 381 U.S. 479 (1965), and Eisenstadt v. Baird, 405 U.S. 438 (1972) (statutes forbidding contraception unconstitutional), to Roe v. Wade, 410 U.S. 113 (1973) (criminal abortion laws unconstitutional). In other words, by the time the Court decided *Roe v. Wade*, constitutional protection for reproductive freedom had been firmly established.

The issue in *Roe* was whether the Court should extend that protection to a woman's decision to terminate an unwanted pregnancy by a medical abortion. *Roe* differed from the other reproductive freedom cases because in *Roe* the State was able to assert a substantial interest to justify interference with a woman's reproductive freedom, namely, the protection of potential human life. Because of the importance of the asserted governmental interest, it would not have been inconsistent with the line of growth of constitutional protection for reproductive freedom for the Court to have held that the asserted governmental interest in protecting potential human life was constitutionally more important than the woman's interest in reproductive freedom. For example, Justice White, who took the position in his concurring opinion in *Griswold*, 381 U.S. 479, 502 (1965), that the Connecticut anticontraception statute violated due process, maintained in his dissenting opinion in *Roe*, 410 U.S. 113, 221–23 (1973), that the Texas antiabortion statute did not. But because the Court had previously held that reproductive freedom is entitled to constitutional protection, the holding in *Roe*, extending that protection to the abortion decision, was fully consistent with the line of growth of constitutional protection for reproductive freedom.

168. To stress the element of choice in constitutional interpretation is not to argue that contemporary discretion is unlimited, but only that the limits are not those imposed by the language and pre-adoption history of the Constitution. The limits, so far as they exist, are those that have developed over time in the ongoing process of valuation that occurs in the name of the Constitution. So understood, the limits upon permissible constitutional interpretation are not external constraints upon our ability to read the Constitution as the embodiment of the current values; they are, rather, the elements of reason that are intrinsic to the process of determining whether a proposed interpretation truly reflects those values.

Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1054–55 (1981).

169. The so-called two-tier standard of review, under which the Court gives greater scrutiny to governmental action affecting fundamental rights, might be considered a manifestation of that concern. Regardless of the extent to which that standard of review is result determinative, as the importance of the individual interest recedes, governmental action interfering with that interest is undoubtedly less likely to be unconstitutional. In Kelley v. Johnson, 425 U.S. 238 (1976), for example, the majority did not consider important an individual's interest in wearing a particular hairstyle. As a result, it sustained the constitutionality of a police hairstyle regulation, even though the governmental interest in maintaining uniformity of appearance among police officers was weak. *Id.* at 248. In contrast, the dissent considered the interest in personal appearance important because of its close relationship to an individual's personality and lifestyle. *Id.* at 250–51 (Marshall, J., dissenting).

how far it can go in restricting electorally accountable policy making. The Court is concerned both with maintaining the importance of electorally accountable policy making (notwithstanding that the Court sometimes invalidates that policy making on constitutional grounds) and with not undermining public acceptance of its function of judicial review by rendering outrageous constitutional decisions.[170]

The Court's concern with the limits of constitutionalization appears most clearly in its treatment of open-ended constitutional provisions such as the due process and equal protection clauses. While critics of noninterpretive review have directed their fire at the Court's fundamental rights adjudication under these provisions,[171] the Court itself has stopped short of extending unalloyed protection to individual interests on the basis of fundamental rights. The number of fundamental rights has been limited,[172] and the Court has refrained from creating any new ones.[173] Nor has the Court used the equal protection clause to impose on the government the general obligation to consider inequality of economic or social condition—that is, to alter the essential class structure of American society. Facially neutral laws generally are not unconstitutional simply because they operate to deny lower-income persons the same opportunities that are available to the more affluent.[174] To summarize, the Court's use of the due process and equal protection clauses to protect individual rights has reflected a considerable degree of restraint, and the Court's decisions in this area have not effected a radical transformation in the way that American society must operate under the Constitution.

Because constraints on constitutional decision making inhere in the nature of the judicial process and in the Court's concern that it perform its constitutional function in a manner that will not diminish public respect for, and acceptance of, that function, noninterpretive review certainly has not undermined the foundations of representative democracy, as the interpretivist critics sometimes imply.

IV. THE LEGITIMACY OF NONINTERPRETIVE REVIEW: A DIFFERENT PERSPECTIVE

A. *Noninterpretive Review and the Structure of Constitutional Governance*

This portion of the Article presents a different perspective on the legitimacy question, one derived from an analysis of the Supreme Court's institu-

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170. For example, in view of the importance of marriage and the family in American society, it is highly unlikely that the Court would hold that the Constitution recognizes a right of homosexual marriage.

171. *See supra* notes 46–50 & 111–13 and accompanying text.

172. At the present time fundamental rights, for purposes of the two-tier standard of review under due process and equal protection, seem limited to the right to vote, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); the right to travel, Shapiro v. Thompson, 394 U.S. 618 (1969); reproductive freedom, Roe v. Wade, 410 U.S. 113 (1973); and marriage and the family, Moore v. City of East Cleveland, 431 U.S. 494 (1977).

173. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (governmental employment is not a fundamental right); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (education is not a fundamental right); Lindsey v. Normet, 405 U.S. 56 (1972) (housing is not a fundamental right).

174. *See, e.g.*, Maher v. Roe, 432 U.S. 464 (1977) (equal protection does not require state to pay expenses of nontherapeutic abortions for indigent women); United States v. Kras, 409 U.S. 434 (1973) (Constitution does not forbid state to impose fee for bankruptcy proceeding on indigents).

tional behavior in constitutional adjudication. In this adjudicative process the Court has simply assumed the legitimacy of noninterpretive review. This section relates the Court's institutional behavior to the structure of constitutional governance established by the Constitution and concludes that noninterpretive review is not only legitimate, but is also a necessary postulate for constitutional adjudication.

The legitimacy question is framed as follows: Is it consistent with the function of the judiciary in our constitutional system for the courts to resolve constitutional questions by a methodology that is not based solely or even primarily on values purportedly constitutionalized by the framers? The interpretivist position, of course, is that it is not. According to Grano, "[T]o be constitutionally legitimate . . . a methodology of judicial review must be at least within the implicit scope of authority that article III grants to the federal judiciary."[175] Thus, the judiciary does not have the authority to "constitutionalize values not inferable from the Constitution itself."[176] Since judicial review results in the invalidation of electorally accountable policy making, and since, according to the interpretivists, the Constitution commits us to representative democracy,[177] the only legitimate constitutional restraints on electorally accountable policy making are those that the framers intended to impose. Those restraints, under the broadest view of interpretivism, must be determined by referring to the values that the framers intended to constitutionalize.[178] Therefore, the interpretivists argue, noninterpretivist review is not legitimate because it is not within the authority of the judiciary under our constitutional system. Under this system, they say, the judiciary's authority is limited to invalidating electorally accountable policy making only when the particular exercise of that policy making is inconsistent with values that the framers intended to constitutionalize.

The interpretivist position is correct insofar as it maintains that the legitimacy question must be determined by referring to the Constitution itself. It is more accurate, however, to say that the answer to the legitimacy question must be found in the *structure* of the Constitution:[179] Is noninterpretive review inconsistent with the structure of constitutional governance established by the Constitution? A careful analysis of that structure of constitutional

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175. Grano, *supra* note 6, at 4 (footnote omitted).

176. *Id.* at 64. He is referring to values that were not constitutionalized by the framers.

177. The noninterpretivists have not expressly challenged this point. *See supra* subpart II(A).

178. Grano, *supra* note 6, at 16, 17.

179. Thus, I am constrained to disagree with the broad functional justification for noninterpretive review proffered by Perry and Brest. While Ely purports to find a functional justification for participation-oriented and representation-reinforcing noninterpretive review in the constitutional structure, I view constitutional structure quite differently than Ely does. Most significant, I do not see a commitment to representative democracy as an important part of that constitutional structure. Furthermore, Ely has not succeeded in sustaining his position that the structure of the Constitution is process oriented. *See, e.g.*, Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

A crucial difference exists between the structural justification for noninterpretive review and what is called the consistency or general intention justification. Structural justification has nothing to do with the intentions of the framers, no matter how broadly those intentions may be construed. Its focus is entirely on the structure of the Constitution that the framers promulgated and on the broadly phrased and open-ended provisions that they put into it. *See infra* notes 80–84 and accompanying text. Since the structural justification for noninterpretive

governance will demonstrate most clearly that the interpretivist position on the legitimacy of noninterpretivist review is completely untenable. Noninterpretive review is not only consistent with the structure of constitutional governance established by the Constitution, but is also fully supportive of that structure. Given the structure of constitutional governance established by the Constitution, noninterpretive review is not only legitimate, but is also a necessary postulate for constitutional adjudication.

The argument that noninterpretive review is fully supportive of constitutional governance established by the Constitution proceeds as follows: (1) The overriding principle in the structure of constitutional governance established by the Constitution is the limitation on governmental power. (2) Many of the limitations on governmental power designed to protect individual rights that are contained in the Constitution are broadly phrased and open ended, and these majestic generalities directed toward the protection of individual rights are a part of our constitutional tradition. (3) Since many of the limitations on governmental power contained in the Constitution are broadly phrased and open ended, these limitations cannot be fully operable in contemporary society as a limitation on governmental power if their meaning is determined solely or even primarily by referring to values purportedly constitutionalized by the framers at an earlier time. (4) Therefore, given items (1) and (3) above, noninterpretive review is not only legitimate, but is also a necessary postulate for constitutional adjudication under our constitutional system.

Two preliminary points should be made before the above propositions are developed more fully. First, an analysis of the legitimacy of noninterpretive review based on the structure of constitutional governance established by the Constitution in no way depends on the intention of the framers, even in the most general sense. That analysis looks to the structure of the Constitution that the framers promulgated and adopted to discover what they did in the document itself rather than what they intended or what they may have thought they were doing. In other words, we are not looking at the mental state of the framers, but at the document that they ordained and established for themselves and their posterity. That document established the structure to which we look to determine the legitimacy of noninterpretive review.[180]

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review is developed independently of the function of the federal judiciary in our constitutional scheme, it does not depend at all on the intentions of the framers regarding the function of the federal judiciary or the exercise of judicial review.

Nonetheless, a marked similarity exists between the structural justification and the general intention justification proposed by Sandalow. Sandalow was not attempting to set forth a justification for noninterpretive review, but instead was describing how the Supreme Court has established the meaning of the Constitution in light of changing circumstances and changing values. In this way he has, in effect, provided a justification for noninterpretive review based on the general intention of the framers, most particularly their intention that the Constitution was to be an enduring document. Therefore, the meaning of particular constitutional provisions may properly change from one generation to another. *See supra* notes 84–94 and accompanying text. While structural justification approaches the question from a different perspective, it reflects the influence of Sandalow's analysis.

180. We look at the structure that the framers established without regard to what they necessarily intended would happen under that structure.

Second, the analysis of the legitimacy of noninterpretive review based on the structure of constitutional governance established by the Constitution does not in any way relate to the function of the federal judiciary in our constitutional system. The structure of constitutional governance operates regardless of judicial review and would be the same even if judicial review did not exist. The structure of constitutional governance binds all branches of the federal government and the states, and it represents the sovereign and supreme will of the people of the United States,[181] determining how they and their posterity should be governed. The Constitution, in the broadest sense, is a political document conveying the wishes of the people of the United States in the matter of their governance.

The federal judiciary comes into play only because under our constitutional system the function of the federal judiciary is to establish the meaning of the Constitution, and the judiciary's view of the meaning of the Constitution is binding on the other branches of the federal government[182] and on the states.[183] If it is fully consistent with the structure of constitutional governance established by the Constitution that the meaning of constitutional provisions in contemporary society need not be determined solely or even primarily by referring to values purportedly constitutionalized by the framers, then the federal judiciary, in performing its recognized constitutional function to determine the meaning of the Constitution, can legitimately engage in noninterpretive review. Therefore, the argument that noninterpretive review is legitimate develops independently of the function of the federal judiciary in our constitutional system. Since noninterpretive review is fully consistent with the structure of constitutional governance established by the Constitution, the judiciary acts legitimately when, in performing its constitutional function, it engages in noninterpretive review.[184]

B. *The Overriding Constitutional Principle: Limitation on Governmental Power*

The overriding principle in the structure of constitutional governance established by the Constitution is the principle of limitation on governmental

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181. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–77 (1803). An underlying—and apparently undisputed—premise of American constitutional theory is that the Constitution emanates directly from the people of the United States. *Id.*

182. The Court noted in Powell v. McCormack, 395 U.S. 486, 549 (1969), that its determination that Congress has the power to refuse to seat a member would not result in "multifarious pronouncements by various departments on one question" because "it is the responsibility of this Court to act as the ultimate interpreter of the Constitution."

183. As it has been ever since the decision in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

184. To illustrate further, suppose that Congress, rather than the Court, is engaging in noninterpretive review. Suppose that Congress is deciding whether it has the power under § 5 of the fourteenth amendment to enact a law prohibiting state and local governments from discriminating on the basis of gender. *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (Congress may, under the fourteenth amendment, authorize suits against states that are constitutionally impermissible in other contexts). Since the framers of the fourteenth amendment clearly did not constitutionalize the value of gender equality, Congress could not constitutionally enact the above law if noninterpretive review were illegitimate under the Constitution. The point here is that the

power rather than the principle of representative democracy. Once this point is fully understood, the supposed tension between noninterpretive review and representative democracy is substantially diminished. Since noninterpretive review supports the overriding principle of limitation on governmental power, it is irrelevant that noninterpretive review results in the invalidation of electorally accountable policy making. The principle of limitation on governmental power is more important than the principle of electorally accountable policy making in the structure of governance established by the Constitution.

This point also completely undermines the essence of the interpretivist position, which is based on the primacy of representative democracy (that is, electorally accountable policy making) and the necessarily undemocratic character of judicial review. The interpretivists maintain that the only limits on otherwise plenary majority rule are those imposed by the Constitution[185] and that those limits should be determined by referring to values purportedly constitutionalized by the framers. Otherwise, the judiciary, which is not electorally accountable, would be engaged in policy making, which is inconsistent with the principle of representative democracy.

The interpretivists and the others who see a purported tension between noninterpretive review and representative democracy have missed the point, because they have simply miscontrued the structure of constitutional governance established by the Constitution. They have given a constitutional significance to representative democracy that cannot reasonably be inferred from this structure. The overriding principle in the structure of constitutional governance, which is clear from a reading of the provisions of the original Constitution and the Bill of Rights,[186] is not the principle of representative democracy, but the principle of limitation on governmental power.

Representative democracy is an important principle in our structure of constitutional governance, but it certainly is not the overriding one. The structure makes it clear that the legislative and executive branches of the federal government are electorally accountable, directly or indirectly.[187] The Constitution directed that those who held the reins of federal legislative and executive power must be electorally accountable. But the same structure also makes it abundantly clear that the framers were not willing to put their faith in representative democracy to prevent abuses of governmental power. The framers were seriously concerned about abuse of governmental power, no

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legitimacy question could arise even if the judiciary did not engage in judicial review. The question is still whether the meaning of the Constitution—established by any branch—must be determined solely with reference to the values that purportedly were constitutionalized by the framers.

185. Bork is the strongest exponent of this position. *See supra* notes 18–19 and accompanying text.

186. The Bill of Rights is properly considered a part of the structure of constitutional governance established by the original Constitution, because it was promulgated "practically contemporaneous with the adoption of the original [Constitution]." The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 67 (1873).

187. Similarly, those branches of the state governments are electorally accountable under their state constitutions.

matter how electorally accountable the government was.[188] If the framers had put their faith in representative democracy alone, they would have considered their task at an end when they established electorally accountable legislative and executive branches. The structure of governance established by the Constitution indicates that the framers resoundingly rejected that approach.

The framers were not only concerned about abuse of governmental power; they were also concerned about the protection of individual rights from the actions of *any* government, no matter how electorally accountable that government was. So, in the same Consitution—referring only to the original Constitution—they imposed substantial limitations on the exercise of power by the newly created federal government.[189] Although the Constitution dealt only with the reservation of powers to the federal government, the framers imposed comparable and additional limitations on the powers of the state governments.[190] A few years later the Bill of Rights was adopted, imposing a whole new set of limitations on the power of the federal government.[191]

The message that the framers were trying to convey through the structure of constitutional governance that they established is clear from a reading of the original Constitution and the Bill of Rights. The framers were saying on behalf of the "people of the United States" to "[them]selves and [their] Posterity":[192] "We believe in representative democracy, and since we must have a government, that government should be electorally accountable. But we are fearful of government. We are concerned about abuse of governmental power. There are certain things that we don't want *any* government, no matter how electorally accountable, to be able to do. Above all, we want to protect certain individual rights—fundamental rights, if you will—from any governmental interference. So, in this Constitution, reflecting the structure of constitutional governance that we have established, we have placed numerous and often sweeping limitations on governmental power."

A fair reading of the original Constitution and the Bill of Rights strongly supports the proposition that the overriding principle of the structure of constitutional governance under the Consitution is the principle of limitation on governmental power rather than the principle of representative democracy.[193] Our Constitution is "chock full" of limitations on governmental power and says to the government time and time again, "Thou shall not." This would be

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188. Tribe has noted that "[a] Bill of Rights directed against federal abuses was thought necessary in addition to the separation and division of powers." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1-2, at 3 (1978). For additional sources, see *id.* n.7.

189. U.S. CONST. art. I, § 9.

190. *Id.* § 10. This is in addition to the federalism limitations imposed by art. IV, §§ 1, 2.

191. As far as the structure of constitutional governance is concerned, the Bill of Rights is properly treated together with the limitations established by the original Constitution. *See supra* note 186.

192. U.S. CONST. preamble.

193. This principle is also reflected by the promulgation of the fourteenth amendment, with its broadly phrased and open-ended limitations on state governmental power, and by the limitations on state governmental power contained in the original Constitution and other subsequent amendments.

rather strange constitutional behavior if the overriding constitutional principle were a commitment to representative democracy. Our Constitution embodies the fundamental concept that no government, no matter how democratic and no matter how electorally accountable it may be, can violate important individual rights. The government cannot do certain things simply because *no* government should ever be able to do them.[194]

Since the overriding principle of the structure of constitutional governance established by our Constitution is the principle of limitation on governmental power, not the principle of representative democracy, it is irrelevant that noninterpretive review is purportedly inconsistent with the principle of representative democracy. Regardless of our political commitment to representative democracy, it simply does not have overriding importance in our structure of constitutional governance. What is most important in that structure is the principle of limitation on governmental power. To the extent that noninterpretive review reinforces that limitation and expands the protection of individual rights, it furthers implementation of the overriding principle in the structure of constitutional governance. Thus, the interpretivist position, which is premised on the primacy of representative democracy and the undemocratic character of judicial review, is completely undermined.

C. *The Constitution's Majestic Generalities*

Many of the Constitution's limitations on governmental power that are designed to protect individual rights are broadly phrased and open ended. The interpretivists insist that the courts must identify the values that the framers intended to constitutionalize in the various provisions of the Constitution and that they must decide on the validity of a challenged law or governmental action solely by referring to those values.[195] But it has not been demonstrated—to take the framework urged by the interpretivists—that the framers intended to constitutionalize values at all when they promulgated constitutional provisions. If they intended to constitutionalize values and to give those provisions a discrete and narrow meaning based on those values, that intention is not manifested in the provisions that the framers promulgated. Looking to the text of the provisions to determine what values the framers purportedly intended to constitutionalize does not provide much guidance on the meaning of the very broad values contained in those provisions. For example, in the

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194. Thus, it is not accurate to view the limitations on governmental power contained in the Constitution, as Bork does, as an effort to accommodate "majority and minority freedom." Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2–3 (1971). The fundamental idea expressed in the Constitution is not that there are limitations on the power of political majorities in order to protect political minorities, but that the power of the government must be limited to protect individual rights. The dichotomy is not between majority and minority, then, but between government and the individual, and our Constitution comes down very strongly in favor of protecting the individual.

195. This assertion is derived from the broad view of interpretivism espoused by Grano. Narrow interpretivists, such as Berger, would say that the decision has to be based on specific value judgments of the framers with reference to historical analogues of those laws.

first amendment the framers intended to constitutionalize the values of freedom of speech and freedom of religion. But this statement gives no more guidance than does a reading of the text alone. Likewise, the value that the framers constitutionalized in the text of the equal protection clause is the extremely broad value of equality, which is not very helpful as an analytical tool, let alone as a definitive guide in determining the meaning of the equal protection clause.[196]

To identify values that the framers purportedly constitutionalized in particular constitutional provisions, the interpretivists fall back on the framers' purpose in promulgating those provisions. The interpretivists are unconcerned that this intention cannot be supported by the text of the provision itself. Nor does it matter that they have no historical evidence that the framers intended to constitutionalize values. It is enough, say the interpretivists, to be able to ascertain what the framers wanted to accomplish with a particular provision; given that purpose, the interpretivists assume that the framers intended to constitutionalize a certain value in that provision.

The interpretivist line then becomes: "Although this may be what the framers said, what they really meant was . . . ." The text of the equal protection clause, for example, is quite clear: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[197] What the framers meant to say, if we accept the position of Grano, was not that at all. What they really meant to say was: "No state shall discriminate against any person on grounds of race or national origin."[198] If this is what the framers meant to say, why didn't they simply say it? Grano and the other interpretivists never explain why the framers apparently were incapable of saying what they meant. May it then be, perhaps, that the framers really did mean what they said?[199]

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196. Professor Westen even stated: "Equality . . . is an empty form having no substantive content of its own." Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 596 (1982). Similarly, Brest observed: "[B]ecause of its indeterminacy, the [equal protection] clause does not offer much guidance even in resolving particular issues of discrimination based on race." Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 232 (1980).

197. U.S. CONST. amend. XIV, § 1.

198. According to Berger, what they meant to say was that no state should discriminate against blacks in the enjoyment of certain specific rights. *See supra* text accompanying note 25.

199. Professor Dimond provides historical evidence that the framers considered and rejected narrow language that would have limited the protections of that provision to the newly emancipated blacks:

> [I]n the Joint Committee on Reconstruction, [John] Bingham proposed the following amendment: "The Congress shall have power to make all laws necessary and proper to secure to all persons in every state within this Union equal protection in their rights of life, liberty and property." Thaddeus Stevens countered with [a proposal that read]: "All laws, state or national, shall operate impartially and equally on all persons without regard to race or color." Both [proposals] were submitted to a subcommittee of five, which included Bingham.

Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 MICH. L. REV. 462, 486 (1982) (quoting JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 46 (B. Kendrick ed. 1914)). Bingham proposed additional drafts, all of which referred to "all persons," and the text of the proposed amendment adopted by the Joint Committee read: "The Congress shall have power . . . to secure to the citizens of each state all privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the several States equal

The argument of the interpretivists that the Court acts illegitimately when it departs from values purportedly constitutionalized by the framers suffers from a number of deficiencies. First, the interpretivists present no historical evidence—which they are otherwise so prone to invoke—that the framers intended to constitutionalize values when they promulgated particular provisions of the Constitution. Second, to maintain that the framers purportedly tried to constitutionalize discrete values, the interpretivists necessarily ignore the framers' use of broadly phrased and open-ended language in the Constitution to set forth limitations on governmental power. Sometimes, as in the equal protection clause, the interpretivists must disregard the plain language of the text and assume that the framers meant something completely different from what they said. The interpretivists thus relate the values allegedly constitutionalized by the framers to the purpose that the framers had in promulgating a particular provison.[200] From this purpose they infer values that the framers purportedly attempted to constitutionalize. The interpretivists thus are forced to argue that since these values must control and since they can be identified only by inference from the framers' apparent purpose, the Court acts illegitimately when it goes beyond these values in establishing the meaning of a constitutional provision—including when it reads the constitutional provision as written or when it looks to the very broad values implied in the text of the provision itself. Unless the framers were incapable of saying what they meant or of embodying their intention in the text of a constitutional proposition, this is truly a startling position in light of the interpretivists' claimed fidelity to the intention of the framers.

Leaving aside these apparent inconsistencies and failures of proof in the interpretivists' position, why are so many constitutional provisions limiting governmental power broadly phrased and open ended? The following explanation may provide some guidance on whether the framers really meant what they said and whether they were really trying to constitutionalize values when they promulgated those provisions.

It is an important part of our constitutional tradition—related both to the overriding principle of constitutional limitation on governmental power and to the proposition that the Constitution is a document intended to endure[201]—that limitations on governmental power designed to protect individual rights are often broadly phrased and open ended. This aspect of our constitutional

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protection in the rights of life, liberty and property (5th Amendment)." *Id.* at 487 (quoting JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 61 (B. Kendrick ed. 1914)). This was the text of the Amendment that the House of Representatives considered in February 1866. After opponents objected that the amendment should impose duties on the states directly, the amendment was reworked, and the proposal by the Joint Committee to Congress on April 30, 1866, contained the language now embodied in § 1 and § 5 of the fourteenth amendment. *See id.* at 486–91 (1982).

200. This discussion assumes that one can properly ascertain the intention of the framers. *See supra* note 56.

201. For an analysis of the relationship between the Constitution as an enduring document and noninterpretive review, see the discussion of Sandalow's views, *supra* notes 84–94 and accompanying text.

tradition is reflected in the Bill of Rights[202] and the fourteenth amendment. Thus, it is difficult to conclude that the framers intended to constitutionalize discrete values when they promulgated those broad provisions. The framers were often setting forth majestic generalities of universal application designed to limit governmental power and to protect individual rights.

This need for broadly phrased and open-ended limitations on governmental power explains why the framers' purpose in promulgating any particular constitutional provision gives little guidance on that provision's meaning. The framers' primary concern in enacting the fourteenth amendment was undoubtedly the protection of the newly emancipated blacks.[203] But it would not be consistent with our constitutional tradition to qualify a significant limitation on governmental power, which the fourteenth amendment certainly was intended to be. In our constitutional tradition limitations on governmental power have been expressed in universal terms rather than restricted to the protection of a particular group. So, even if the framers of the fourteenth amendment were primarily concerned with preventing discrimination against blacks, the fourteenth amendment, consistent with this aspect of our constitutional tradition, was phrased in majestic generalities and universal protections.[204] The framers then meant what they said: *all* persons are entitled to equal protection of the laws.[205] To say that the framers intended to constitu-

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202. In contrast, the limitations on governmental power contained in the original Constitution for the most part were fairly specific.

203. In this regard the Supreme Court has stated:

> [I]n the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each . . . the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freedman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.

The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 71 (1873).

204. Even in *The Slaughterhouse Cases* the Court noted about the thirteenth amendment that

> [w]hile negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter . . . . [I]f other rights are assailed by the states which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent.

Id. at 72. Justice Powell observed in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 293 (1977): "Although many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white 'majority.' . . . the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude."

205. The debates preceding the adoption of the fourteenth amendment concerned the effect it would have on existing and anticipated discriminatory practices and how the courts and Congress, in the exercise of its § 5 powers, would interpret the amendment. *See generally* Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 MICH. L. REV. 462, 494–502 (1982). The debates do not indicate that the framers did not intend the protections of the fourteenth amendment to be universal. When the framers wanted to limit the scope of protection to a particular kind of discrimination, they were capable of expressing their intention accordingly. Thus, the fifteenth amendment provides that the right to vote "shall not be abridged on account of race, color or previous condition of servitude." U.S. CONST. amend. XV, § 1. It does not say: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State."

Because the protections of the fifteenth amendment are limited to racial discrimination, the nineteenth amendment was necessary to prevent abridgement, on account of sex, of the right to vote. But because the fourteenth amendment's protections are not limited in this way, the Court could rely on it to invalidate gender-based discrimination.

tionalize only the value of racial equality in the fourteenth amendment's equal protection clause ignores not only the plain language of the text, but also the constitutional tradition within which the framers operated. Thus, we have no reason to say that the Court has acted illegitimately when it has defined the equal protection clause to prohibit other forms of discrimination.

The framers of the Bill of Rights most certainly were not conveying the kind of message that the interpretivists imply must be conveyed by any constitutional provision limiting the exercise of governmental power: "We are firmly committed to representative democracy, and the electorally accountable branches of the government must be free to govern as they wish—except for those specific limitations on governmental power, reflecting values that we have constitutionalized, that are contained in the Bill of Rights." Quite to the contrary, the Bill of Rights conveys a very different message. It reads like a political exhortation addressed to all the branches of the federal government—Congress, the President, and the Judiciary—containing a long list of "Thou Shall Nots."

A number of these "Thou Shall Nots" are expressed in majestic generalities, such as the entire first amendment, the fourth amendment's search and seizure provision, and the fifth amendment's due process clause. Others are somewhat broadly phrased, in various levels of generality, while still others concern particular practices in colonial times that the framers found objectionable.[206] More significant, perhaps, than the particular guarantees themselves is the total effect of the Bill of Rights. It is sweeping in its prohibitions, quantitatively and qualitatively, demonstrating not only that the overriding principle of constitutional governance is the principle of limitation on governmental power, but also that these limitations are extensive, often broadly phrased and open ended, and overlapping in their totality. The overlapping nature of the provisions of the Bill of Rights makes it especially clear that the framers did not attempt to constitutionalize discrete values into these provisions. If that had been their intention, some of the provisions clearly would be redundant. If, for example, the framers were trying to constitutionalize the value of fair procedure in the fifth amendment's due process clause, then it would not have been necessary for them to set forth in the sixth amendment a host of more particularized procedural guarantees, such as the right to be informed of the nature and cause of the accusation,[207] the right of confrontation, the right of compulsory process, and the right to a speedy trial. The framers obviously took no chances in the message they were sending. They listed several particularized procedural guarantees, but at the same time

206. The latter category includes the third amendment's prohibition against the quartering of soldiers in private homes and the fifth amendment's requirement of grand jury indictment.

207. Fair notice and a fair opportunity to defend, for example, are required in civil cases by the due process clause. *See* Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950). A fortiori, they would be required in criminal cases even in the absence of the specific guarantees of the Bill of Rights.

they wanted to establish the broader principle that no person shall be deprived of "life, liberty or property, without due process of law."[208]

After providing this lengthy list of limitations on governmental power, the framers added the ninth amendment. Again, the message is clear: "We tried to get it all down. But, in case we forgot anything, remember that individuals have still other rights that the government cannot violate." Thus, we have another of the majestic generalities: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[209]

Since lawyers have been accustomed to working with the Constitution as a legal document, they might assume that the framers wanted to embody a distinct legal meaning in all provisions of the constitution. After reading the Constitution, particularly the Bill of Rights, that assumption seems to be completely unwarranted. It is much more reasonable to conclude that the framers' primary concern was not how (or if) lawyers and judges would fashion constitutional doctrine from the Bill of Rights. Rather, it seems that although the Bill of Rights analytically was a legal document, its framers' major objective was to convey a *political message* as strongly as they could: "The power of the government must be limited in order to protect individual rights."[210]

Remember, also, that the sweeping limitations on governmental power contained in the Bill of Rights were not adopted on the assumption that the federal judiciary would define these limitations and would enforce them

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208. U.S. CONST. amend. XIV, § 1. Mott states that the phrase "due process of law" first appeared in a statute in England in 1354: "[N]o man of what estate or condition he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law." R. MOTT, DUE PROCESS OF LAW § 14, at 37 (1926) (quoting 28 Edw. III, ch. 3 (1354)). "Due process" as used in that statute was assumed to have the same meaning as "law of the land" in chapter 29 of the 1225 version of the Magna Carta: "No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty or estate, but by the judgment of his peers of the law of the land." R. MOTT, DUE PROCESS OF LAW § 28, at 77. One can argue, however, that the phrases did not have the same meaning in English law and that "law of the land" was significant in the development of English law while "due process" was not. *See* Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265, 279 (1975). Nevertheless, the phrases were treated as if they had the same meaning in this country during the late 18th and early 19th centuries: some state constitutions used the phrase "law of the land," while others used "due process of law." So, when the framers used the phrase "due process of law" in the fifth amendment, they were hearkening back to the Magna Carta and to the broad principles of individual freedom that it enshrined.

209. U.S. CONST. amend. IX. Ely observed that "the conclusion that the Ninth Amendment was intended to signal the existence of federal constitutional rights beyond those specifically enumerated in the Constitution is the only conclusion its language seems comfortably able to support." J. ELY, DEMOCRACY AND DISTRUST 38 (1980).

210. Since this is the message that the framers were trying to convey by the language of the Bill of Rights, it does not matter what their motivation was in promulgating the Bill of Rights. Bork says that the Bill of Rights was a "hastily drafted document upon which little thought was expended." Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J 1, 22 (1971). He relies on the research of Levy, which shows that the Bill of Rights was drafted by the Federalists in response to objections raised to the Constitution by the Anti-Federalists and that the Federalists, who opposed a Bill of Rights, promised to submit one only to get the Constitution ratified. L. LEVY, LEGACY OF SUPPRESSION 224–33 (1960). Regardless of the framers' motivations in promulgating the Bill of Rights, the instrument they drafted conveys a strong political message that the power of the government must be limited to protect individual rights.

against the electorally accountable branches of the federal government. It is debatable whether the framers contemplated judicial review,[211] but even if they did, they did not adopt the limitations of the Bill of Rights to enable the judiciary to check the exercise of power by the other branches. Rather, the framers were trying to establish the overriding principle that the power of government must be limited to protect individual rights, and they accomplished their goal by imposing a host of limitations on governmental power, a number of which were broadly phrased and open ended.

This portion of the Article has attempted to explain precisely why so many of the constitutional limitations on governmental power designed to protect individual rights are broadly phrased and open ended. It has shown that the broadness of these restrictions is an important part of our constitutional tradition, reflected in the Bill of Rights and at a later time in the fourteenth amendment. Constitutional guarantees protecting individual rights are often set forth as majestic generalities with universal application precisely because the overriding principle of the structure of governance established by the Constitution is that of limiting governmental power. In promulgating the Bill of Rights the framers addressed a very strong political message to all the branches of the federal government. The Bill of Rights was not adopted on the assumption that the federal judiciary would define those provisions and enforce them against the electorally accountable branches of the federal government.

For these reasons, no basis exists for concluding that the framers intended to constitutionalize discrete values when they promulgated the Bill of Rights or when, consistent with the constitutional tradition established at that time, they promulgated other broadly phrased and open-ended provisions of the Constitution, such as the fourteenth amendment. What the framers were trying to do is what they actually did in the text of the Constitution: to set forth significant limitations on governmental power in order to protect individual rights. Therefore, it is patently unsound to evaluate the legitimacy of constitutional decision making by referring to values purportedly constitutionalized by the framers, when it is clear that the framers did not try to constitutionalize values at all.

D. *The Legitimacy and Necessity of Noninterpretive Review*

Noninterpretive review is not only legitimate, but is also a necessary postulate for constitutional adjudication under our constitutional system. Since many of the Constitution's limitations on governmental power are broadly phrased and open ended, they cannot operate in contemporary society to limit governmental power if their meaning is determined solely or even primarily by referring to values purportedly constitutionalized by the framers

211. But if they did not, they could have had no intention regarding whether noninterpretive review was within the authority of the federal judiciary under article III. *See* PERRY, *supra* note 4, at 20–21.

at an earlier time. In other words, even if one could say that the framers did intend to constitutionalize discrete values, the Court does not act illegitimately when it goes beyond those values to make the constitutional provision fully operable as a limitation on governmental power in contemporary society.

The federal judiciary, of course, has the responsibility for establishing the meaning of the provisions of the Constitution and for giving concrete expression to those broadly phrased and open-ended limitations on governmental power contained in the Constitution.[212] In defining those provisions, the Court must consider two very important points. First, the provisions must be defined in a manner consistent with the overriding principle of the structure of constitutional governance: "The power of the government must be limited in order to protect individual rights." Second, since the Constitution is a document intended to endure,[213] the constitutional limitations on governmental power must continue to restrict that power in the present as they have in the past. For these broadly phrased and open-ended provisions to be fully operable as limitations on governmental power in contemporary society, the Court cannot be constrained, when it is defining those provisions, to values purportedly constitutionalized by the framers at an earlier time. Therefore, noninterpretive review is not only a legitimate postulate for constitutional adjudication under our constitutional system, but also a necessary one.[214]

The *bête noire* of the interpretivists—the imputation of a substantive meaning to the due process clause and the use of the due process clause to invalidate governmental action substantively interfering with liberty and property rights[215] —illustrates this proposition. Since the starting point for constitutional analysis must be the text or internal inferences of the Constitution,[216] consider the text of the due process clause. Its terms are broad and open ended: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."[217] In determining the meaning of the due process clause, interpretivists focus on the word "process" and say that by adopting the due process clause of the fifth and fourteenth amendments the framers intended to constitutionalize only process values, not substantive values.[218] Assume, *arguendo*, that from a historical standpoint this position is correct[219]

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212. *See supra* notes 136 & 147.

213. *See supra* note 201.

214. Under interpretive review, carried to its logical conclusion, the Court would not be properly performing its constitutional function. In this sense interpretive review is not legitimate because it is not consistent with the Court's constitutional responsibility to establish the meaning of all of the provisions of the Constitution.

215. Consideration of governmental interference with those interests by means of improper procedures is not included.

216. *See supra* note 179 and accompanying text.

217. U.S. CONST. amend. V. Similar language is contained in the fourteenth amendment.

218. *See supra* text accompanying notes 47–49.

219. Note, however, that by the time the fourteenth amendment was enacted, at least some state courts had ascribed a substantive meaning to the due process and law of the land clauses of the state constitutions. *See* E. CORWIN, LIBERTY AGAINST GOVERNMENT 89–115 (1948). So, when the framers of the fourteenth amendment used the phrase "due process of law," they must have been aware that they were using a phrase that could be interpreted to have a substantive meaning.

and that the framers of the fifth and fourteenth amendments took those clauses to mean that the government could not interfere with liberty and property interests except through procedures that satisifed those principles of fundamental fairness "implicit in the concept of ordered liberty."[220] In other words, under the analysis of the interpretivists, the framers constitutionalized the value of "procedural fairness," and only that value, when they promulgated the due process clause.

The framers, however, did not say, "No person shall be deprived of life, liberty and property except in accordance with fair procedures." They used the more sweeping phrase "due process of law,"[221] although they presumably understood the term to mean procedural fairness. But regardless of their understanding when they promulgated the provision, they phrased it in a broad and open-ended manner and, by its text, indicated a strong concern that "life, liberty, [and] property" be protected against improper governmental interference. The framers of the fifth amendment,[222] recalling the history of interference with liberty and property rights in England and during colonial times, apparently feared that the government would interfere again with those rights by arbitrary and unfair procedures. They may have believed that liberty and property interests would be adequately protected from improper governmental interference if the government were required to act in accordance with fair procedures; therefore they imposed a process limitation in the text of the due process clause.

However, the objective of the due process clause was to limit "forever" the power of the government to interfere with an individual's liberty and property rights. The framers were not concerned with fair procedure for its own sake, but only as a means to an end: namely, the protection of liberty and property interests. Of course, they could not have contemplated the sweeping economic and social regulation of a later era. One cannot imply that the framers intended the due process clause to have a substantive meaning,[223] because they did not attempt to give specific meanings to the provisions they adopted.[224] But the due process clause, by its terms, contemplates protection of liberty and property interests against improper governmental interference.

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220. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

221. For a discussion of the historical meaning of that term, see *supra* note 208. We have no evidence, of course, that the framers understood the meaning of "due process" in the historical sense and no evidence at all about their intentions regarding the meaning of the due process clause. Rather, the interpretivists assume that, because "due process" was historically considered to have only a procedural meaning, the framers intended to constitutionalize only process values into the due process clause.

222. The interpretivists assume that the intention of the framers of the fifth amendment carried over to the framers of the fourteenth amendment; that is, that the framers of the fourteenth amendment intended its due process clause to have the same meaning as the fifth amendment's due process clause, notwithstanding that in the interim some state courts had ascribed a substantive meaning to the corresponding clauses in the state constitutions. *See supra* note 219.

223. Sandalow notes in passing: "[I]t is true that all the decisions shaping constitutional law to contemporary values can also be understood as coming within the general intentions of the framers. All that is necessary is to state those intentions at a sufficiently high level of abstractness." Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1045 (1981).

224. *See supra* notes 206–11 and accompanying text.

Later, when sweeping economic and social regulation created an apparent threat to liberty and property interests, the due process clause remained a textual limitation on governmental power and was properly invoked to challenge such regulation.[225]

The Court could have rejected a challenge of this sort and refused to impute a substantive meaning to the term "due process of law." It could have defined "due process" by referring to the framers' meaning when the due process clause was promulgated. But the Court, in performing its constitutional function of establishing the meaning of the Constitution, also could have focused on the framers' objective in promulgating the due process clause rather than on what the framers thought was necessary at that time to implement their objective. When the Court concluded that liberty and property interests would not be protected in contemporary society by fair procedures alone, it could properly have imputed a substantive meaning to due process and relied on the due process clause as the textual basis for invalidating an improper interference with liberty and property interests.[226]

What the Court did was to define the due process clause in a way that made it fully operable as a limitation on governmental power in contemporary society. The Court saw the threat to the enjoyment of liberty and property interests arising not from procedural unfairness but from substantive enactments that, in the Court's view, improperly interfered with those interests.[227] Consequently, the Court defined the due process clause in such a way that it would serve as a continuing limitation on governmental power and would be

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225. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Lochner v. New York, 198 U.S. 45 (1905).

226. The Court did just that in *Lochner* and *Roe*. Commentators and Justices have portrayed the Court's decisions invalidating economic regulation in the *Lochner* era as demonstrations of noninterpretivism at its worst, and the specter of Lochnerism has been invoked as an argument against the use of the due process clause to protect personal rights. Justice Black stated in his dissent in *Griswold*:

> The Due Process Clause with an "arbitrary and capricious" or "shocking to the conscience" formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of this Nation. *See, e.g., Lochner*. . . . That formula, based on subjective considerations of "natural justice," is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights.

Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Black, J., dissenting).

Nonetheless, Tribe observed that in the *Lochner* era "the Supreme Court's views echoed a powerful strand in the thought and politics of the early twentieth century." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8–2, at 435 (1978). He added: "In large measure, however, it was the economic realities of the Depression that graphically undermined *Lochner*'s premises. No longer could it be argued with great conviction that the invisible hand of economics was functioning simultaneously to protect individual rights and produce a social optimum." *Id.* § 8–6, at 446. He concluded: "[T]he error of decisions like *Lochner* . . . lay not in judicial intervention to protect 'liberty' but in a misguided understanding of what liberty actually required in the industrial age." *Id.* § 11–1, at 564 (footnote omitted). Similarly, Sandalow commented:

> What values are basic to a free society, as our history demonstrates, is a question that different generations are likely to answer differently. In the age of enterprise, "liberty of contract" was thought to be fundamental and, the framers having neglected to provide for it, protection for it was found in the due process clauses. Economic freedoms are less highly prized now, and so "liberty of contract" is no longer a vital doctrine. Substantive due process, however, despite occasional pronouncements as to its demise, retains vitality, protecting interests that a new generation of Americans have come to see as fundamental, interests as diverse as freedom of travel and privacy.

Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1051 (1981) (footnotes omitted).

227. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Lochner v. New York, 198 U.S. 45 (1905).

fully operable to protect liberty and property interests in contemporary society. The Court's acting in this fashion is both legitimate and necessary because it enables broadly phrased and open-ended limitations on governmental power to remain effective through time. If the Court were constrained by values purportedly constitutionalized by the framers in the due process clause, that clause would not continue to protect those liberty and property interests that the framers sought to protect at a time when the threat to those interests came from improper substantive regulation rather than from procedural unfairness. To restrict the meaning and application of the due process clause in this way would not be consistent with the overriding principle in the governmental structure established by the Constitution: that the power of the government must be limited to protect individual rights.

V. CONCLUSION

The different perspective on the legitimacy question that this Article has attempted to provide leads to the conclusion that the legitimacy of noninterpretive review follows from the structure of constitutional governance established by the Constitution. The overriding principle in that structure is the concept of limitation on governmental power. This principle is reflected in a number of broadly phrased and open-ended constitutional provisions that are designed to limit governmental power in order to protect individual rights. These provisions must be fully operable in contemporary society as continuing limitations on governmental power. Therefore, in establishing the meaning of these provisions in contemporary society the Court cannot be constrained by values that the framers purportedly constitutionalized at an earlier time.[228]

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228. Critics of broad noninterpretivist review contend that it results in judges' infusing their personal values into the Constitution. Grano states:

> [F]undamental rights without roots in the written Constitution cannot be identified without making debatable political, normative, or moral judgments that require certain activities to be distinguished from other, often similar activities. Because objective criteria do not exist for deciding where the lines should be drawn, judges tend to draw them in accordance with personal preference.

Grano, *supra* note 6, at 23–34 (footnote omitted). Ely maintains that since it is impossible to discover fundamental values in any of the sources on which proponents of fundamental rights adjudication have relied, the judges necessarily fall back on their own values in deciding what rights are fundamental and what limitations the broadly phrased and open-ended provisions of the Constitution are to impose. *See supra* note 68.

However, merely because objective criteria are not available to provide a consistent basis for value infusion (a point that Ely has demonstrated rather convincingly), it does not follow that the Court's value infusion is nothing more than the sum total of the personal values of the individual Justices. In the first place, while it may not be possible to discover fundamental values in any single source to provide a consistent basis in that source for value infusion, it may be possible to identify important values by a consideration of a number of sources, such as the "traditions and [collective] conscience of our people," Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)), or the "teachings of history [and] solid recognition of the basic values that underlie our society," Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (quoting Griswold v. Connecticut, 381 U.S. 479, 501 (1965)).

More significant, when the Court makes the necessary value infusion in defining the meaning of broadly phrased and open-ended provisions of the Constitution, such as the due process clause, it is acting, as it always does, institutionally. The individual Justices participate in the decision making process as part of the Court's institutional nature and function. The question for the Court collectively and for the Justices individually as they participate in the decision making process is: What values should a particular provision embody? The values that an individual Justice thinks the provision should embody might be quite different from the: Justice's

Thus, noninterpretive review is not only legitimate, but is also a necessary postulate for constitutional adjudication under our constitutional system. Noninterpretive review is necessary to ensure that the overriding principle in the structure of constitutional governance established by our Constitution—that the power of the government must be limited to protect individual rights—will have full force and effect in each succeeding generation.

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personal values. An individual Justice, for example, might believe that most governmental economic regulation is undesirable, but at the same time may take the position that the value of economic freedom should not be embodied in the due process clause and that the due process clause should not be used to restrict significantly the power of the government to enact economic regulation. Likewise, an individual Justice may find abortion to be personally abhorrent, but might conclude that reproductive freedom, reflected in the decision to terminate an unwanted pregnancy, is a very important individual right that should be free from governmental interference.

The point, then, is that different Justices may look to different sources to determine what values should be infused into the broadly phrased and open-ended provisions of the Constitution. Although a Justice's personal values may conceivably influence that Justice's opinion of what values should be infused into a provision, what emerges in constitutional adjudication is an *institutional* decision of the Court. It is the institutional value infusion of the Court rather than the personal values of the individual Justices that ultimately controls.